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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD GERALD JORDAN,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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QUESTIONS PRESENTED

1. Whether, in a capital sentencing proceeding, exclusion of virtually all evidence of a defendant's socially useful behavior while in prison and other mitigating evidence is consistent with *Lockett v. Ohio*, 438 U.S. 586 (1978), and the requirement of individualized sentencing.

2. Whether a death sentence imposed by a jury based in part on a finding that the murder was "especially heinous, atrocious or cruel" is consistent with *Godfrey v. Georgia*, 446 U.S. 420 (1980), when (a) the jury received no instruction at all as to the meaning of this aggravating circumstance, (b) no facts sufficient to support any constitutional construction of this aggravating circumstance were found at either the trial or the appellate level, and (c) there were substantial mitigating circumstances that the jury was required to weigh against the aggravating circumstances.

3. Whether the prosecutor's closing argument, filled with numerous references to the prosecutor's personal beliefs and experience, repeated references to Petitioner's failure to take the stand at previous trials, admonitions to the jury to do its "duty," and disparaging references to Petitioner's exercise of his constitutional rights, denied Petitioner a fair trial in violation of the Fourteenth Amendment or otherwise violated Petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

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No.

RICHARD GERALD JORDAN,
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v.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Richard Gerald Jordan (Petitioner) petitions for a writ of certiorari to review the judgment of the Supreme Court of Mississippi in this case.

OPINIONS BELOW

The Supreme Court of Mississippi, by a five-to-four vote, affirmed Petitioner's sentence of death, which had been entered by the Circuit Court of Harrison County, Mississippi, following a jury trial. The majority and dissenting opinions of the Supreme Court of Mississippi are reported at 464 So. 2d 475 and are reprinted at App. 1a-33a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982). On January 30, 1985, the Supreme Court of Mississippi (four justices dissenting) affirmed Petitioner's death sentence. On March 13, 1985,

that court (four justices again dissenting) denied Petitioner's petition for rehearing, without issuing an opinion.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Fifth Amendment to the Constitution of the United States of America: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life . . . without due process of law . . . ."

Sixth Amendment to the Constitution of the United States of America: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

Eighth Amendment to the Constitution of the United States of America: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment to the Constitution of the United States of America: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Section 99-19-101 of the Mississippi Code of 1972 Annotated, as amended in 1977 and 1983: "(3) For the jury to impose a sentence of death, it must unanimously find in writing the following: . . . (c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances. . . . (5) Aggravating circumstances shall be limited to the following: . . . (h) The capital offense was especially heinous, atrocious or cruel. . . . (6) Mitigating circumstances shall be the following: (a) The defendant has no significant history of prior criminal activity."

STATEMENT OF THE CASE

This case arises from the direct appeal to the Supreme Court of Mississippi of a sentence of death imposed on April 29, 1983. No case related to that sentence has

previously been before this Court, but certain previous proceedings involving Petitioner—resulting in sentences that were vacated as unconstitutional—are pertinent to the present petition.

On January 12, 1976, Petitioner killed Edwina Marter by a single gunshot to the head, producing instantaneous death. On January 13, 1976, Petitioner confessed to the killing but stated that he had not intended to hit anyone with the shot that he fired. Petitioner had no prior criminal record.

In July 1976, the State of Mississippi prosecuted Petitioner for capital murder. Petitioner did not take the stand in his own behalf, but his confession was introduced in evidence. The jury returned a guilty verdict, and a sentence of death automatically followed under the Mississippi statute then in effect. The trial court, however, granted Petitioner a new trial after the Supreme Court of Mississippi, to avoid constitutional problems, declared the statute not to provide for a mandatory death penalty.

On February 28 and March 1 and 2, 1977, the State again prosecuted Petitioner for capital murder. Petitioner did not testify, but his confession was once again introduced. The jury found Petitioner guilty and returned a death sentence. On August 6, 1982, the United States Court of Appeals for the Fifth Circuit ordered that a writ of habeas corpus issue, providing that Petitioner receive a sentence less than death unless resentenced at another hearing.[1] The Fifth Circuit found that the jury had not been instructed in accordance with *Godfrey v. Georgia*, 446 U.S. 420 (1980), and "could have considered any number of potentially arbitrary and irrelevant unspecified factors"—indeed, that the prosecutor had encouraged it to do so.[2]

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[1] *Jordan v. Watkins*, 681 F.2d 1067, *reh'g denied*, 688 F.2d 395 (5th Cir. 1982).

[2] 681 F.2d at 1082.

A new sentencing hearing, conducted under a new Mississippi statute,[3] began on April 26, 1983. The defense called some eighteen witnesses who testified, among other things, to Petitioner's good character and his loving relationship with his wife and children. In an effort to demonstrate to the jury that Petitioner could be rehabilitated and could make a meaningful contribution to society if allowed to live, Petitioner also proffered substantial testimony regarding his actions in the years since the crime, but virtually all such evidence was excluded as irrelevant. As stated in more detail below, the trial court sustained every single objection to the testimony of prison guard Lucius Brown regarding Petitioner's exemplary behavior while in prison.[4] And another witness who would have testified about Petitioner's actions while in prison—specifically, about a significant invention by Petitioner—was not even allowed to take the stand at all.[5]

Petitioner testified in his own behalf. As in his 1976 confession, Petitioner testified that the killing had been unintentional,[6] and in all other material respects Petitioner's testimony was identical to his confession.

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[3] Miss. Code Ann. § 99-19-101 (Cum. Supp. 1983).

[4] *See* Tr. 856-69, App. 41a-51a.

[5] *See id.* at 922-23, App. 52a-53a.

[6] *Compare* Transcript of Proceedings on Appointment of Attorney at 2035, *State v. Jordan*, No. 491 (County Court of Harrison County, Miss., Jan. 13, 1976) (transcript of tape-recorded confession) ("She started running down the hill. At that time I took my pistol, I didn't even have it in my hand. I took it out of the waist band of my trousers and I was going to fire a shot over her head, just a warning type shot . . . ."), *with* Tr. 973-74 ("I glanced back at her, and she had started to run. I just hollered stop and reached for the gun in my trousers about the same time. The gun was on the left side. And I pulled it out and was just going to shoot, I would say from shoulder level, just to scare her; to let her know to stop.").

At the close of the evidence, the state and Petitioner proposed instructions. Petitioner objected to the state's instruction on the ground (among others) that the aggravating circumstance of an "especially heinous, atrocious or cruel" crime constitutionally must be limited to murders involving torture or the like, which differ from this case.[7] One of Petitioner's proposed instructions would have limited this aggravating circumstance by using the precise words that the Supreme Court of Mississippi had used to narrow it. Nonetheless, the trial court granted the state's proposed instruction, which simply repeated the statutory language and provided the jury with no guidance at all as to the limits of this aggravating circumstance, and refused all of Petitioner's proposed limiting instructions.[8]

After the jury was instructed, one of the prosecutors began closing argument for the state. Immediately he referred to Petitioner's silence at his prior trials, and immediately defense counsel objected. As stated in more detail below, the prosecutor then embarked on a wide-ranging discussion of his personal position, his beliefs, the jury's "duty," and Petitioner's exercise of his constitutional rights. All defense objections and motions for mistrial were summarily overruled.[9]

On April 29, 1983, following more than three hours of deliberations, the jury returned a verdict of death, finding (among other things) that the crime was "especially heinous, atrocious or cruel." On May 13, 1983, the court denied a motion for new trial in which Petitioner argued that the trial errors included exclusion of mitigating evidence, improper instruction on the "heinous, atrocious or

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[7] Petitioner first made this argument in a pretrial motion. *See* Tr. 61-63, App. 37a-39a.

[8] *See id.* at 1184-86, 1218-19, 1221, 1078-87, App. 54a-62a. Indeed, every one of Petitioner's 36 proposed instructions was refused.

[9] *See id.* at 1090-108, 1157-58, App. 63a-78a.

cruel" aggravating circumstance, and improper denial of Petitioner's motions for mistrial based on the closing argument.[10] All of these arguments were also raised on appeal to the Supreme Court of Mississippi,[11] which, by five votes to four, affirmed Petitioner's sentence on January 30, 1985, and denied his rehearing petition on March 13, 1985.[12]

REASONS FOR GRANTING THE WRIT

This case, which sharply divided the Supreme Court of Mississippi, raises three important issues that fully deserve review under this Court's Rule 17(b) and (c). In Part I, we show that the majority below, in a decision with far-reaching implications, upheld the exclusion of substantial mitigating evidence. That decision is in clear violation of *Lockett v. Ohio*, 438 U.S. 586 (1978), and is inconsistent with numerous decisions of lower federal and state courts. In Part II, we show that the court's application of the "heinous, atrocious or cruel" aggravating circumstance completely ignores the requirements of *Godfrey v. Georgia*, 446 U.S. 420 (1980), and directly conflicts with a decision of a federal court of appeals. Finally, in Part III, we show that the prosecutor engaged in egregious misconduct in closing argument, raising important constitutional questions that have not been, but should be, settled by this Court. All of these issues repeatedly arise in death-penalty cases, and the combination of all the errors below shows such fundamental unfairness in the trial that certiorari is appropriate.

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[10] *See id.* at 1236-43, App. 79a-82a.

[11] Relevant portions of Petitioner's initial brief to that court are reprinted at App. 83a-96a.

[12] *See* App. 1a-34a, 36a. An order entered March 4, 1985, staying Petitioner's execution "pending final disposition of [his] Petition for Rehearing and further order of this Court," remains in effect. App. 35a.

I. Petitioner Was Improperly Prevented from Presenting Substantial Mitigating Evidence in Clear Violation of this Court's Mandate in *Lockett v. Ohio*.

Over the dissent of four justices, the Supreme Court of Mississippi below upheld the exclusion of significant mitigating evidence proffered by Petitioner. In a decision that we believe is unprecedented, the majority in effect deemed irrelevant evidence of positive, socially beneficial conduct engaged in by a capital defendant after the commission of the crime, such as Petitioner's invention of an alternative means for generating electricity. That decision, which is flatly inconsistent with *Lockett v. Ohio*, 438 U.S. 586 (1978), and with the constitutional requirement of individualized sentencing in capital cases, warrants this Court's review. A clear statement is needed from this Court that, under *Lockett*, jury consideration of a capital defendant's actions cannot be artificially restricted in time to those that take place before the crime.

Throughout Petitioner's sentencing proceeding, defense efforts to present mitigating evidence concerning Petitioner's conduct following the crime were severely curtailed. Indeed, one potentially critical witness proffered by the defense was precluded from testifying at all. That witness would have testified about an invention—in which the Tennessee Valley Authority had expressed considerable interest—that Petitioner had made, after the commission of the crime and while in prison, for generating electricity from energy sources such as wind tunnels.[13] The trial judge evidently viewed the invention as irrelevant simply because it concerned "thoughts and ideas developed by Mr. Jordan since he has been in prison."[14]

Similarly, the testimony of a number of defense witnesses was substantially restricted. For example, the

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[13] *See* Tr. 922, App. 52a.

[14] *Id.*, App. 52a.

defense sought to present the testimony of Officer Lucius Brown, a guard in the Mississippi State Penitentiary, regarding Petitioner's exemplary behavior in prison following the crime. After asking Officer Brown a few background questions,[15] defense counsel sought to inquire about Petitioner's conduct and attitude in prison; however, the prosecution repeatedly objected to these questions, and the trial court sustained every objection.[16] The

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[15] The questions to which the prosecution did not object concerned merely the witness' background and his appointment of Petitioner as hall man for the cell block. *See id.* at 856-58, App. 40a-43a. The statement in the majority opinion below that Officer Brown was permitted to testify "in detail as to circumstances surrounding the life and character of [Petitioner]" (464 So. 2d at 485, App. 19a) is simply inaccurate. We have included in the appendix the entire examination of Officer Brown, including the prosecution's cross-examination, during which the state was permitted—over the objections of defense counsel—to ask questions concerning misconduct in which other death row prisoners had engaged (Tr. 863-64, App. 46a-47a), to suggest that Petitioner had been on death row longer than virtually any other prisoner in Mississippi (Tr. 864-65, App. 47a-48a), and to demand the witness' badge number in order to insinuate to the jury that the witness was doing something wrong in testifying (Tr. 869, App. 51a).

[16] Q. Officer Brown, does the job of hall man require your placing a degree of trust in the person selected?

BY MR. OWEN: May it please the Court, we object to this. First of all, this is three years after the crime.

BY THE COURT: I sustain it.

. . .

BY MR. HUDSON: Q. Has Gerald Jordan ever demonstrated any violent tendencies?

A. Not to my knowledge.

BY MR. OWEN: May it please the Court, we object to that. . . .

BY THE COURT: Sustained.

. . .

Q. How would you characterize [the defendant's] attitude?

A. Peaceful, well mannered person—

[Footnote continued]

effect—again—was virtually as if the witness had been precluded from taking the stand altogether.

The majority below upheld these exclusions of mitigating evidence without any analysis or citation of authority, terming the proffered evidence "not . . . reasonably relevant to the question of whether or not Jordan should suffer death or be sentenced to life in prison." [17] As noted by the dissent in relation to the excluded testimony concerning Petitioner's invention, this holding is fundamentally at odds with the concept of individualized sentencing that is at the very heart of this Court's death-penalty jurisprudence:

> No basis in fact, reason or legal authority is offered for [the majority's] conclusion. Why is evidence that Jordan may have made a useful invention—and presumably, has the ability to make more—not

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[16] [Continued]

BY MR. NECAISE: We object to that . . . .

BY THE COURT: Sustained.

BY MR. HUDSON: Q. Do you know the reputation of the Defendant for peace and violence?

BY MR. NECAISE: We object to that, if the Court please.

BY THE COURT: Sustained. . . .

. . .

BY MR. HUDSON: Q. Do you know, Officer Brown, whether or not this is a defendant that can be rehabilitated?

BY MR. NECAISE: We object to that, if the Court please.

BY THE COURT: Sustained.

BY MR. HUDSON: Q. Is it true, Officer Brown, that other inmates in M.S.U. frequently have fights on the yard?

A. Yes.

Q. Has Gerald Jordan ever been involved in any of them?

BY MR. NECAISE: Objection.

BY THE COURT: Sustained.

Tr. 858-60, App. 43a-44a.

[17] 464 So. 2d at 485, App. 19a.

> relevant to the question of whether he should suffer death? We are simply not told.
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> . . . .
>
> I can say with confidence . . . that there are not just a few persons within our society who, faced with a life or death determination, would regard it as relevant that the defendant, since his crime and incarceration, had applied his wit and ingenuity and made an invention that would benefit society. Not all of us are without the capacity to see as proper the amelioration of the harshness of the law in the face of genuine repentence, pursuit of atonement and demonstrably responsible behavior.[18]

This Court has repeatedly admonished that the sentencing body in a capital case must be allowed to consider the individual circumstances of the crime and the character of the particular defendant. In *Woodson v. North Carolina*, 428 U.S. 280 (1976), for example, the Court struck down a mandatory death-penalty statute, reasoning that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." [19] And in *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court reaffirmed this principle. Describing the issue presented as "which facets of an offender or his offense [are] 'rele-

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[18] *Id.* at 490-91, App. 30a (Robertson, J., dissenting).

[19] 428 U.S. at 304 (plurality opinion); *see also Roberts (Harry) v. Louisiana*, 431 U.S. 633, 637 (1977) (per curiam) ("it is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense"); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 333-34 (1976) (plurality opinion) (striking down a mandatory death-penalty statute because it "afford[s] no meaningful opportunity for consideration of mitigating factors presented . . . by the attributes of the individual offender").

vant' in capital sentencing," [20] the Court concluded that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor, any aspect of a defendant's character or record* and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." [21]

The reason for the *Lockett* rule is to ensure that, before a jury imposes the ultimate criminal sanction, it has been allowed to consider fully any potential mitigating or humanizing circumstances surrounding the defendant's life that might suggest a lesser punishment. But that is precisely what the jury was not permitted to do here. The jury was not permitted to consider Petitioner's invention and model behavior in prison. Had those factors been brought to the jury's attention, they would have shown the jury that Petitioner could make a positive contribution to society while in prison—if allowed to live.

There is no plausible reason why evidence of positive steps taken by a capital defendant should be kept from a jury simply because they occurred after the crime.[22] In this regard, the majority's holding not only is inconsistent with the central thrust of *Lockett*, but it is in direct conflict with numerous decisions by lower courts imple-

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[20] 438 U.S. at 604 (plurality opinion).

[21] *Id.* (footnotes omitted) (emphasis added in part); *see also Eddings v. Oklahoma*, 455 U.S. 104 (1982) (vacating a capital sentence because it was imposed following a trial in which the sentencer's consideration of mitigating evidence had been restricted).

[22] The dissent below made clear the complete unfairness of the majority's approach: "We have held repeatedly that *bad* things that a capital defendant does *after* his crime may be shown as aggravating circumstances. . . . It certainly follows that *good* things the defendant does *after* the commission of the crime may be shown in mitigation." 464 So. 2d at 488, App. 25a (Robertson, J., dissenting) (emphasis in original).

menting the *Lockett* mandate. Both state and federal courts have repeatedly held relevant and admissible evidence of positive actions taken by a capital defendant—regardless of whether they occurred before or after the defendant's crime and incarceration.[23] The split between the Supreme Court of Mississippi here and the other lower federal and state courts regarding this critical question warrants this Court's review.

Nor can the improper exclusion of the proffered testimony concerning Petitioner's invention be salvaged, as the majority below sought to do, by suggesting that the evidence might have been hearsay. As noted by the dissent,[24] there is absolutely nothing in the record to support the majority's speculation. And, even if one assumes *arguendo* that the excluded evidence would have been hearsay, this Court has cautioned that " 'the hearsay rule may not be applied mechanistically to defeat the ends of justice' " by excluding mitigating evidence in a capital sentencing proceeding. *Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)).[25] The majority's total dis-

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[23] *See, e.g., Washington v. Watkins*, 655 F.2d 1346 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982); *People v. Harris*, 36 Cal. 3d 36, 679 P.2d 433, 201 Cal. Rptr. 782, *cert. denied*, 105 S. Ct. 365 (1984); *State v. Watson*, 129 Ariz. 60, 628 P.2d 943, 946-47 (1981) ("[t]he fact that [the defendant] has been a model prisoner and has attempted to further his education can and should be considered"); *see also Simmons v. State*, 419 So. 2d 316 (Fla. 1982) (reversing a death sentence because mitigating evidence concerning the defendant's capacity for rehabilitation had been excluded).

[24] *See* 464 So. 2d at 489, App. 26a-27a (Robertson, J., dissenting).

[25] *Cf. Williams v. New York*, 337 U.S. 241, 247 (1949) ("modern concepts individualizing punishment have made it all the more necessary that [the sentencing body] not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence").

As noted by the dissent below, the majority invoked "[a]nother red herring," 464 So. 2d at 489, App. 27a (Robertson, J., dis-

regard for *Green* and its unfounded speculation only serve to underscore the need for review by this Court.

II. Petitioner's Capital Sentence Violated the Requirements of *Godfrey v. Georgia*.

In *Godfrey v. Georgia*, 446 U.S. 420 (1980), this Court made clear that, while a capital sentence can constitutionally be based on a finding that the murder was particularly heinous, the state must channel the sentencing body's discretion in making this finding, so as to ensure that the decision to impose the death sentence is based on clear, objective standards reflecting "reason rather than caprice or emotion." [26] No such channeling occurred here, and Petitioner's sentence of death is based, to an extent that cannot be known, on a wholly unguided finding by the jury that the murder was "especially heinous, atrocious or cruel"—a finding that the Supreme Court of Mississippi on appeal did not independently review. The total disregard below for the *Godfrey* mandate warrants this Court's review.

At the conclusion of the sentencing hearing, the trial judge instructed the jury that one of the statutory ag-

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senting), by arguing that the *Lockett* violation was somehow less significant simply because Petitioner might have attempted to testify about the invention himself. When Petitioner took the stand, the trial court had already excluded as irrelevant the proffered testimony about the invention, and Petitioner cannot be faulted for respecting the trial court's ruling. More important, the majority's suggestion would make a mockery of *Lockett*. Because the jury is likely to view the testimony of a capital defendant with extreme suspicion, other witnesses are typically called to provide mitigating character evidence. Yet the reasoning of the majority below would authorize the complete exclusion of all such evidence whenever the defendant is competent to testify about his own background—i.e., in virtually all, if not all, cases. The implications of that reasoning are sufficiently important, if *Lockett* is to have any real meaning, to merit this Court's review.

[26] 446 U.S. at 433 (plurality opinion).

gravating circumstances it could consider was whether the murder was "especially heinous, atrocious or cruel." The trial court provided the jury with absolutely no guidance as to what this open-ended language meant.[27] Indeed, it refused to give any of the limiting instructions proposed by Petitioner, including one that would have defined the phrase exactly as the Supreme Court of Mississippi had—that the aggravating circumstance is limited to "the conscienceless or pitiless crime that is unnecessarily torturous to the victim." [28]

As a result, the jury's finding of this aggravating circumstance provides no "meaningful basis" [29] for the imposition of the death penalty in this case. Any murder could be deemed "especially heinous, atrocious or cruel." As this Court stated in *Godfrey* in relation to a similar statutory aggravating circumstance:

> There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wan-

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[27] Tr. 1184, App. 55a; *see* Miss. Code Ann. § 99-19-101(5)(h) (Cum. Supp. 1983). The judge simply listed the aggravating circumstances that the jury could consider, using verbatim the language of the statute.

[28] Tr. 1221, App. 60a; *see Coleman v. State*, 378 So. 2d 640, 648 (Miss. 1979). The Supreme Court of Mississippi in *Coleman* adopted this definition from *Spinkellink v. Wainwright*, 578 F.2d 582, 611 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

The other two limiting instructions that were refused would have informed the jury that it could not find the murder especially "heinous, atrocious or cruel" (1) if it found that "the victim died a quick death without unnecessary pain and torture" or (2) unless it found that the murder "was accompanied by acts of torture." Tr. 1218-19, App. 58a-59a.

[29] *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion) (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)).

> tonly vile, horrible and inhuman." Such a view may, in fact, have been one to which members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of [the aggravating circumstance's] terms. In fact, the jury's interpretation of [the aggravating circumstance] can only be the subject of sheer speculation.[30]

Despite the clear holding in *Godfrey*, the Supreme Court of Mississippi below concluded that no clarifying instruction was required because "the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended." [31] This holding—which has been endorsed only by a bare majority of the justices on that court—flies in the face of *Godfrey*. As four members of the Supreme Court of Mississippi [32] and a unanimous panel of the United States Court of Appeals for the Eleventh Circuit [33] have recognized, the failure to provide a narrow-

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[30] 446 U.S. at 428-29 (plurality opinion).

[31] 464 So. 2d at 478, App. 4a (quoting *Spinkellink v. Wainwright*, 578 F.2d at 611). The court of appeals decision in *Spinkellink* preceded *Godfrey*, and on this point it no longer can be considered good law. *Cf. Proffitt v. Wainwright*, 685 F.2d 1227, 1261-62 n.52 (11th Cir. 1982) (concluding that a related aspect of *Spinkellink* is no longer valid in light of *Godfrey*), *cert. denied*, 104 S. Ct. 508 (1983).

[32] *Edwards v. State*, 441 So. 2d 84, 96 (Miss. 1983) (Prather, J., dissenting) ("We should adopt [a limiting] jury instruction requirement as . . . mandated by *Godfrey*. It is obvious that the average juror does not know our own narrow construction of the words 'especially heinous, atrocious or cruel.' "). In subsequent cases, including the present one, the court has viewed the five-vote majority opinion in *Edwards* as controlling. *See* 464 So. 2d at 478, App. 4a.

[33] *See Proffitt v. Wainwright*, 685 F.2d at 1265.

ing instruction rendered the jury's finding "standardless and unchanneled." [34]

Nor was this constitutional defect in the sentence cured through appellate review. On appeal, the Supreme Court of Mississippi did not apply a constitutionally narrow construction of the aggravating circumstance and determine that the murder properly came within its terms. Instead, it merely concluded that the "facts constituted a question for the jury as to whether the killing was especially heinous, atrocious and cruel." [35] But if the issue constituted a question for the jury, then it was clearly crucial that the jury be properly instructed [36]—something that unquestionably did not occur. As in *Godfrey*, nothing said or done by the Supreme Court of Mississippi on appeal eliminated this critical flaw in the capital sentence.

To be sure, the jury found two other aggravating circumstances,[37] and this Court has held that under some circumstances the presence of one improper aggravating circumstance does not necessarily render a capital sentence arbitrary and unconstitutional, if there are other proper aggravating circumstances. But this case is fundamentally different from *Zant v. Stephens*, 462 U.S. 862 (1983), and *Barclay v. Florida*, 463 U.S. 939 (1983). Unlike the Georgia statute in *Zant*, the Mississippi stat-

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[34] *Godfrey v. Georgia*, 446 U.S. at 429 (plurality opinion).

[35] 464 So. 2d at 478, App. 4a.

[36] Even if arguably a properly instructed, hypothetical jury could have found the murder "especially heinous, atrocious or cruel," it clearly also could have reached the opposite result. The evidence was undisputed that the victim, Edwina Marter, died instantaneously from a single bullet wound. And there was no evidence of any torture, rape, or assault.

[37] The two circumstances were that the murder was committed (1) for pecuniary gain and (2) during the commission of a kidnapping. *See* Miss. Code Ann. § 99-19-101(5)(f), 99-19-101(5)(d) (Cum. Supp. 1983).

ute specifically requires the jury to balance the aggravating and mitigating circumstances in reaching its sentencing determination;[38] unlike in *Barclay*, there were substantial mitigating factors in this case, both statutory and nonstatutory.[39] There is simply no way to know whether the jury would have sentenced Petitioner to death had it received a limiting instruction on the "especially heinous, atrocious or cruel" aggravating circumstance.

Recognizing this fact, the Supreme Court of Florida has repeatedly held that a capital sentence based in part on an improper aggravating circumstance must be vacated if significant mitigating circumstances are present,[40] and four justices of the Supreme Court of Mississippi have also concluded that a capital sentence cannot stand in such circumstances.[41] A majority of the justices of the Supreme Court of Mississippi, however, have in effect determined that the existence of significant mitigating factors can be ignored and a death sentence can be affirmed, no matter how many unconstitutional aggravating circumstances exist, so long as a single proper aggravating circumstance is present.[42] The split between

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[38] *See* Miss. Code Ann. § 99-19-101(3)(c) (Cum. Supp. 1983).

[39] The record established, for example, that Petitioner had no significant history of prior criminal activity, a statutory mitigating circumstance. *See* Miss. Code Ann. § 99-19-101(6)(a) (Cum. Supp. 1983). The uncontradicted testimony of numerous witnesses also revealed that Petitioner had been a loving father and husband. And, of course, as discussed previously, had other testimony not been improperly excluded, the existence of other, compelling mitigating factors would have been disclosed to the jury.

[40] *See, e.g., Moody v. State*, 418 So. 2d 989, 995 (Fla. 1982), *cert. denied*, 459 U.S. 1214 (1983); *Riley v. State*, 366 So. 2d 19, 22 (Fla. 1979); *Elledge v. State*, 346 So. 2d 998, 1002-03 (Fla. 1977).

[41] *See Edwards v. State*, 441 So. 2d at 96 (Prather, J., dissenting).

[42] *See Edwards v. State*, 441 So. 2d at 91-92.

the highest courts in Mississippi and Florida, and the strong division within the Mississippi court, demonstrate that this is a troubling constitutional question, meriting this Court's attention.

Indeed, this issue is among the most critical in the death-penalty area generally. As this Court is aware, the capital sentencing statutes of many states include an aggravating circumstance such as "especially heinous, atrocious or cruel," and it is found applicable by juries in most, if not all, capital cases.[43] A sharply divided Supreme Court of Mississippi has in effect held, in direct conflict with *Godfrey*, that it is simply irrelevant that jurors are given no guidance as to what this potentially boundless phrase contemplates. Stating that the issue was one for the jury, it also has seen no need to review the jury's finding itself. And it has viewed as insignificant the existence of substantial mitigating factors that may very well have led the jury to give Petitioner a life sentence had it been properly instructed. The result is a wholly arbitrary sentence based on the finding of an aggravating circumstance that provides no "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it [is] not."[44] Certiorari is appropriate.

III. The Prosecutor Engaged in Egregious Misconduct in Closing Argument, Substantially Prejudicing the Fairness of Petitioner's Sentencing Trial.

Repeated prosecutorial misconduct during closing argument seriously prejudiced the fairness of Petitioner's sentencing trial, and such misconduct is a widespread

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[43] *See Godfrey v. Georgia*, 446 U.S. at 454 (White, J., dissenting) (noting that this factor had been the exclusive or nonexclusive basis for the imposition of a death sentence in over 30 Georgia cases); *Proffitt v. Wainwright*, 685 F.2d at 1263 (referring to the "numerous" Florida cases involving this aggravating circumstance).

[44] *Godfrey v. Georgia*, 446 U.S. at 433 (plurality opinion).

problem that deserves this Court's attention. Dean Pound observed in 1930 that "[w]e must go back to the seventeenth century—to the trial of Raleigh or to the prosecutions under Jeffreys—to find parallels for the abuse and disregard of forensic propriety which threatens to become staple in American prosecutions." [45] Ever since, commentators have cited with increasing alarm the frequency of prosecutorial misconduct,[46] and the caseload of this Court and the federal courts of appeals suggests that the problem is only getting worse, particularly in capital sentencing proceedings.[47] Just this Term this Court has heard two cases involving improper closing argument. *United States v. Young*, 105 S. Ct. 1038 (1985); *Caldwell v. Mississippi*, No. 83-6607 (U.S. argued Feb. 25, 1985).

This case presents even more compelling prosecutorial misconduct than did either *Young* or *Caldwell*. Special Assistant District Attorney Joe Sam Owen was the first person to address the jury following instructions. He began his argument by emphasizing Petitioner's fail-

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[45] R. Pound, *Criminal Justice in America* 187 (1930).

[46] *See, e.g.*, Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Tex. L. Rev. 629, 631 (1972); Hobbs, *Prosecutor's Bias, an Occupational Disease*, 2 Ala. L. Rev. 40, 50 (1949); Singer, *Forensic Misconduct by Federal Prosecutors—and How It Grew*, 20 Ala. L. Rev. 227, 227 (1968); Note, *Prosecutor Forensic Misconduct—"Harmless Error"?*, 6 Utah L. Rev. 108 (1958).

[47] In 1983 and 1984, the United States Court of Appeals for the Eleventh Circuit alone decided four death-penalty cases involving prosecutorial misconduct of constitutional dimension. *Hance v. Zant*, 696 F.2d 940, 951-53 (11th Cir.), *cert. denied*, 103 S. Ct. 3544 (1983); *Tucker v. Zant*, 724 F.2d 882, 886-90, *reh'g en banc granted*, 724 F.2d 898 (11th Cir. 1984) (No. 83-8137); *Tucker v. Francis*, 723 F.2d 1504, 1506-08, *reh'g en banc granted*, 723 F.2d 1518 (11th Cir. 1984) (No. 83-8466); *Brooks v. Francis*, 716 F.2d 780 (11th Cir. 1983), *reh'g en banc granted*, 728 F.2d 1358 (11th Cir. 1984) (No. 83-8028). The grants of *en banc* rehearing in three of those cases demonstrate the importance of the issue presented and the need for guidance by this Court.

ure to testify at the guilt phases of his previous trials. The trial court overruled defense counsel's immediate objection,[48] and Owen quickly proceeded to state:

> You are going to hear the statement of counsel opposite about the duty and responsibility of the District Attorney's Office to prosecute and see that the death penalty is imposed.[49] But *I tell you as I stand here*, I am not a member of the District Attorney's Office. *I'm a Special Prosecutor; I haven't been assigned to nor affiliated with the District Attorney's Office in seven (7) years. I am not a proponent of the death penalty in every case.* I have never advocated that, and I don't advocate that to you today. *But what I tell you* is that there are cases that exist that warrant the imposition of the death penalty. *And I have never in my eleven (11) years of practice ever seen a case so atrocious, so cruel and inhumane, that justifies the death penalty as this particular case does.*[50]

After two more references to Petitioner's exercise of his Fifth Amendment rights,[51] Owen proceeded to complain to the jury about "the ordeal we have gone through for three days [and] the same thing when we tried it; seven, eight or nine days of trial" [52] because Petitioner had counsel and "got all of the Constitutional Rights afforded him." [53] Again bemoaning "what has happened to our society" and complaining that "we have got to spend days here arguing" because of Petitioner's constitutional rights, Owen suggested that exercise of those rights meant that Petitioner "can maybe slip in some

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[48] Tr. 1090-91, App. 64a.

[49] Defense counsel made no such statement.

[50] Tr. 1091-92, App. 64a-65a (emphasis added).

[51] *Id.* at 1098, 1102, App. 69a, 72a-73a.

[52] The guilt phase of Petitioner's trial had in fact lasted three days (February 28 and March 1 and 2, 1977).

[53] Tr. 1103, App. 73a.

legal technicality, . . . can employ some type of legal gymnastics." [54] Owen then returned to the subjects of his personal feelings, position, and experience and the jury's "duty":

> *I feel strongly about this case. And I'm not going to sit here as an officer of the Court and lie to you about the facts in this case.* They speak the truth. . . . I tell you, each and every one of you, that *you have a duty and a job consist*[*e*]*nt with the oath that you took when it was administered to you*—to impose the death penalty when the facts and circumstances are warranted. And they are warranted here. . . . You talking about society; Kevin is now ten (10). He was three (3) when his mother died. The oldest son is seventeen (17). They are the ones who are going to look back and see what justice is. My momma was shot down in the woods with a .38, and her murderer got life imprisonment.[55]

Defense counsel's prompt objection was summarily overruled. Owen then closed by emphasizing his own disbelief of Petitioner's testimony; by noting his own and the district attorney's Catholic faith and their belief in the death penalty; by telling the jurors, "I expect you to help us bring to a conclusion this seven years"; by appealing to the jurors as "law abiding, Christian citizens"; and by suggesting that they "stand on" their "duty and . . . awesome responsibility." [56]

The prosecutor's closing remarks were plainly improper. Indeed, even the State of Mississippi has admitted that similar arguments in *Caldwell* "may have been inappropriate, undesirable, or universally condemned." [57]

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[54] *Id.* at 1103-04, App. 73a-74a.

[55] *Id.* at 1104, App. 74a (emphasis added).

[56] *Id.* at 1105-07, App. 75a-76a.

[57] Brief for the Respondent at 62, No. 83-6607 (filed Jan. 7, 1985).

In *Young*, this Court stated that "[t]he prosecutor was . . . in error to try to exhort the jury to 'do its job'; that kind of pressure . . . has no place in the administration of criminal justice." [58] Statements of personal belief in closing argument have been widely and strongly condemned.[59] Owen's complaints about Petitioner's exercise of his constitutional rights were of the variety that courts have described as "altogether improper." [60] And, in truly egregious misconduct, Owen in effect offered himself as an "expert" in crime to the jury—and one who deserved special credibility because he was a special prosecutor. He expressly relied on his eleven years of practice as a basis to "tell" the jury that a comparison of this case with others, about which the jury had no evidence, showed the appropriateness of the death penalty. Such "testimony," subject to no cross-examination and inherently believable to a lay jury, has received—and deserves—universal condemnation.[61]

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[58] 105 S. Ct. at 1048; *see also id.* at 1054 (Brennan, J., concurring in part and dissenting in part) ("Many courts historically have viewed such warnings about not 'doing your job' as among the most egregious forms of prosecutorial misconduct."); *State v. Jones*, 277 Minn. 174, 152 N.W.2d 67, 77-78 (1967); *State v. Thomas*, 168 N.J. Super. 10, 401 A.2d 693, 696 (App. Div. 1979).

[59] *See, e.g., United States v. Bess*, 593 F.2d 749, 753, 757 (6th Cir. 1979) (expressing "astonishment" at prosecutor's "inexcusable" conduct); *Stewart v. United States*, 247 F.2d 42, 47-48 (D.C. Cir. 1957) (opinion of Fahy, J.) (reversing death sentence because of prosecutor's statement of personal belief).

[60] *E.g., Commonwealth v. Joyner*, 469 Pa. 333, 365 A.2d 1233, 1234-35 (1976); *see also id.* at 1236 (prosecutor's expressions of personal belief "emphatically condemned"); *United States v. Hughes*, 389 F.2d 535 (2d Cir. 1968).

[61] *See, e.g., Berger v. United States*, 295 U.S. 78, 88 (1935) ("improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none"); *Tucker v. Zant*, 724 F.2d at 889 ("Such arguments are objectionable because their effect is to assure the jurors that someone with greater experience

The factors that led the Court to uphold a conviction despite similar misconduct in *Young* are absent from the present case. *First*, unlike *Young*, this was a death case. In a capital case, more than in any other, the passion of jurors can easily be aroused; as this Court has admonished, it is especially important in this context that the verdict be "based on reason rather than caprice or emotion." [62] In this case, the jury had to make the highly subjective determination of whether Petitioner should live or die, comparing evidence of a serious crime with considerable testimony about the positive aspects of Petitioner's character. It is simply inconceivable that the jury's delicate task of balancing these factors was not affected by Owen's assurance that a sentence of death would not be out of line with other cases, his admonition that a sentence of life imprisonment would be, and all his inflammatory rhetoric. The misconduct cannot be dismissed, as in *Young*, on the groud that the evidence of guilt was overwhelming.

Second, no lawyer had addressed the jury in summation before Owen, and no mention of his personal characteristics or beliefs had been (or was) made; thus,

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has already made the decision that the law imposes on them."); *Hance v. Zant*, 696 F.2d at 951; *State v. Butler*, 277 S.C. 543, 290 S.E.2d 420, 421 (1982) (unanimously reversing death sentence because remarks similar to Owen's injected an arbitrary factor into sentencing in violation of Eighth Amendment); *State v. Smith*, 279 N.C. 163, 181 S.E.2d 458 (1971); *State v. Farrell*, 61 N.J. 99, 293 A.2d 176, 178 (1972); Alschuler, *supra* note 46, at 634 & n.22; Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 Colum. L. Rev. 946, 955-56 & n.49, 958 & n.58 (1954) (collecting cases); *see also Young*, 105 S. Ct. at 1043 n.5, 1048.

[62] *Godfrey v. Georgia*, 446 U.S. at 433 (plurality opinion); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion); *see also Brooks v. Francis*, 716 F.2d at 788; *Hance v. Zant*, 696 F.2d at 951. Moreover, as a Texas prosecutor wrote: "There is perhaps no place where argument reigns more supreme than in the sentencing hearing . . . ." Crump, *The Function and Limits of Prosecution Jury Argument*, 38 Sw. L.J. 505, 528 (1974).

there was no "invited response" of the sort that seemed decisive in *Young*. *Third*, this Court is not limited to the "plain error" issue described as "principal" in *Young*,[63] since defense counsel objected to Owen's improper argument.[64] *Fourth*, Owen clearly "impl[ied] that the prosecutor had access to evidence outside the record," [65] specifically the details of other murder cases; it was because *no* such implication was present in the prosecutor's remarks in *Young* that the Court deemed those remarks not a basis to overturn a conviction.

The fundamental unfairness resulting from prosecutorial misconduct rose to the high level required for reversal in a state criminal case.[66] Owen's remarks were hardly "ambiguous" or "a few brief sentences"; [67] his personal beliefs were the beginning, the ending, and the centerpiece of his jury argument.[68] And, as noted above, prosecutorial misconduct is likely to have a particularly significant effect in a capital case.

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[63] 105 S. Ct. at 1042.

[64] Similarly, in *Caldwell*, the state argues primarily that the improper prosecutorial remarks were invited and that there were no contemporaneous objections—arguments that are inapplicable here.

[65] *Young*, 105 S. Ct. at 1048.

[66] The "fundamental unfairness" test in this context stems from *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974). In addition, Owen's comments negated the careful channeling of jury discretion required under the Eighth Amendment in a capital case. And we respectfully support the position of Bobby Caldwell, petitioner in No. 83-6607, that remarks such as these constitute a violation of the Confrontation Clause. *See generally* Carlson, *Argument to the Jury and the Constitutional Right of Confrontation*, 9 Crim. L. Bull. 293 (1973).

[67] *Donnelly*, 416 U.S. at 645, 647.

[68] *See Berger v. United States*, 295 U.S. at 89 ("we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential").

Despite all of this misconduct, the Supreme Court of Mississippi did not even see a need to address this issue on appeal, although raised in Petitioner's opening brief, reply brief, and rehearing petition. That court appears ready, from now on, to condone any closing argument, no matter how emotionally charged or filled with references to personal opinion. This Court should grant certiorari so that cases such as this one do not become even more common.

This becomes still more apparent when one considers a related issue that the Supreme Court of Mississippi did address: Petitioner's claim under *Griffin v. California*, 380 U.S. 609 (1965). After acknowledging that Owen repeatedly called attention to Petitioner's prior exercise of his Fifth Amendment rights, the court simply held that any defendant who testifies at the sentencing phase of a capital trial completely waives his right under *Griffin* to be free of adverse comment on his failure to testify at the culpability phase.[69] That holding misread this Court's precedent.

This Court has never held that prior silence may always be used by the prosecutor. Instead, the Court has consistently required a threshold determination that the particular situation is one "in which silence is . . . more probative than prejudicial." [70] To be sure, this Court has declared that the determination is governed by state evi-

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[69] 464 So. 2d at 482, App. 12a-13a.

[70] *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980); *see Stewart v. United States*, 366 U.S. 1, 5 (1961) ("*[I]n no case has this Court intimated that there is such a basic inconsistency between silence at one trial and taking the stand at a subsequent trial that the fact of prior silence can be used to impeach any testimony which a defendant elects to give at a later trial.*") (emphasis added); *id.* at 5-6 (noting that in *Raffel v. United States*, 271 U.S. 494 (1926), the impeached testimony was a direct contradiction of evidence given by the same witness at an earlier trial); *Tucker v. Francis*, 723 F.2d at 1510 ("the constitutional issues are largely resolved by the probative value determination").

dence law. But that does not mean that a state can declare *all* silence to be more probative than prejudicial, and it clearly does not mean that a state court may allow use of prior silence *without* making any attempt to determine whether it is more probative than prejudical.[71] Because the Supreme Court of Mississippi completely failed to take account of the limitations that this Court has imposed on comment on prior silence, and because the prosecution repeatedly referred to Petitioner's prior silence as part of its continuing grandstand play before the jury, certiorari is appropriate.

CONCLUSION

This case presents three issues, each of sufficient importance that certiorari should be granted. Indeed, the *combined* effect of the rulings of the trial court, upheld by the Supreme Court of Mississippi, was to deny Petitioner any semblance of a fair trial before a jury whose discretion was adequately channeled. Each juror who sat through this trial was (1) unaware that Petitioner had spent his time in jail peacefully and productively; (2) under the false impression, uncorrected by instructions in accordance with *Godfrey*, that it could deem all murders "heinous, atrocious or cruel"; and (3) told by an "officer of the Court" that Petitioner's exercise of his constitutional rights, including his right to remain silent, had put everyone through an ordeal, and that, if the facts of other cases were in evidence, Petitioner would be shown uniquely deserving of death. Such a juror, we submit,

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[71] Nor, on the facts of this case, could Petitioner's prior silence be found more probative than prejudicial. Petitioner's testimony regarding the facts of the crime was identical to his contemporaneous confession in 1976, which was introduced in the prior trials. Thus, the situation was not at all like *Raffel v. United States*, 271 U.S. 494 (1926), where exculpatory testimony could have been but was not offered in the prior trial, nor was it like *Jenkins v. Anderson*, 447 U.S. 231 (1980), where prearrest silence was inconsistent with a claim of self-defense.

was many, many times more likely to vote for death than a juror who knew of Petitioner's societal contributions, was properly instructed that "heinous, atrocious or cruel" applies only to those crimes that are "unnecessarily torturous to the victim," and had only the evidence in this case (and argument as to reasonable inferences from that evidence) as a basis to make the life-or-death determination.

It is not this Court's role to correct every error, or even every constitutional error, committed by state and lower federal courts, but neither is it this Court's role to allow a person to be executed on the basis of a record showing as much fundamental unfairness as this one. The issues discussed above are recurring ones of great importance in capital cases; they are especially important because the Supreme Court of Mississippi has disregarded binding precedent of this Court and has reached decisions in conflict with federal courts of appeals and other state courts of last resort. We respectfully request that certiorari be granted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

RICHARD GERALD JORDAN,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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SUPREME COURT OF MISSISSIPPI

No. 55,493

RICHARD GERALD JORDAN

v.

STATE OF MISSISSIPPI

Jan. 30, 1985

EN BANC.

ROY NOBLE LEE, Presiding Justice, for the Court:

This case involves the third time that Richard Gerald Jordan has been sentenced to death for the capital murder of Mrs. Edwina Marter. On July 21, 1976, he was found guilty of capital murder and was given the death penalty for the first time. That conviction was prior to procedures laid down in *Jackson v. State*, 337 So.2d 1242 (Miss.1976), providing for bifurcated trials in capital murder cases. The lower court granted a motion for new trial under the precedents established in *Jackson* and Jordan was tried, convicted and sentenced to death a second time. The conviction and sentence were affirmed in *Jordan v. State*, 365 So.2d 1198 (Miss.1978), petition for rehearing was denied by this Court, and Jordan petitioned the United States Supreme Court for writ of certiorari to the Mississippi Supreme Court, and certiorari was denied. *Jordan v. Mississippi*, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979).

Subsequently, Jordan applied to this Court for leave to file a petition for writ of error coram nobis, which was

denied. 390 So.2d 584. The Federal District Court denied habeas corpus relief, and, upon appeal of such denial, the United States Fifth Circuit Court of Appeals, 688 F.2d 395, vacated the sentence and remanded for another sentencing hearing finding that there had been a violation of the *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) mandate, in that the instructions failed to channel the sentencers' discretion by clear and objective standards, and did not provide specific and detailed guidance. 681 F.2d 1067. The State of Mississippi was denied rehearing in *Jordan v. Thigpen*, 688 F.2d 395 (5th Cir.1982).

Jordan was tried again on the sentencing phase in the Circuit Court of Harrison County, and, for the third time, a jury imposed the death penalty upon him. He has appealed from that sentence and assigns eleven (11) errors in the trial below. The facts of the case are detailed in *Jordan v. State*, 365 So.2d 1198 (Miss.1978), and we will only briefly state them here.

On or about January 10, 1976, Jordan traded a shotgun for a .38-caliber revolver in Baton Rouge, Louisiana, then drove to Gulfport, Mississippi, and registered at the Twin Star Motel under the name of "Jack Wilson." In order to obtain money, he devised a scheme to kidnap the relative of a bank executive and demand a ransom. Still using the fictitious name of "Jack Wilson," he called Gulf National Bank and expressed a desire to speak to the commercial loan officer, and was referred to a Mr. Marter, whose wife subsequently became Jordan's victim.

Jordan perused the Gulfport telephone directory and found that there was only one family by the name of Marter living in the city. He drove by the Marter residence, then stopped, rang the doorbell and was admitted into the home by Mrs. Marter, when he represented that his electrical company had received information of defective circuit breakers in the area, which he was inves-

tigating.[1] Thereupon, he kidnapped Mrs. Marter and took her to a sparsely settled wooded area in DeSoto National Park where he shot her in the head with the .38-caliber revolver and killed her. Jordan then demanded $25,000 from Mr. Marter without telling him that his wife had been slain. Mr. Marter obtained the ransom money, delivered it to a drop place as instructed by Jordan, who retrieved the ransom. He was followed by the police and was arrested within a relatively short while.

I.

THE TRIAL COURT'S INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES WERE UNCONSTITUTIONALLY VAGUE AND PERMITTED THE JURY TO FIND AGGRAVATING CIRCUMSTANCES THAT WERE UNSUPPORTED BY THE RECORD AND THAT IMPERMISSIVELY OVERLAPPED WITH EACH OTHER AS WELL AS THE STATUTORY ELEMENTS OF CAPITAL MURDER.

Under this assignment of error, Jordan attacks three elements of aggravating circumstances submitted to the jury, *viz*, (1) especially heinous, atrocious and cruel, (2) for pecuniary gain, and (3) while engaged in the commission of the crime of kidnapping.

A. *Especially heinous, atrocious and cruel.*

The record indicates that Jordan entered the home of Mrs. Marter when only she and her small child, who was asleep, were in the home. He forced her to leave her home, refused to permit her to arrange for the care of the child or take the child with her, then forced her to an isolated place. The record reflects that she was frightened during this time and inferences are that he shot

[1] Jordan had dressed and disguised himself as an electrical inspector.

her in the back of the head at a time when she was on her knees. Regardless of her position at the time of the murder, if she was running or trying to get away from him, that indicates how terrified she was at the time he killed her. We think these facts constituted a question for the jury as to whether the killing was especially heinous, atrocious and cruel, and as said by the Fifth Circuit in *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978),

> Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

578 F.2d at 611.

We have decided this question adversely to Jordan's position in *Edwards v. State*, 441 So.2d 84 (Miss.1983), and in every case where the question has been raised since *Edwards*.

B. *For Pecuniary Gain.*

Jordan contends that it was improper to allow the jury to consider both kidnapping and pecuniary gain because they are elements of the same offense, and there was a doubling of aggravating circumstances. This question has been decided adversely to Jordan in *Irving v.*

State, 441 So.2d 846 (Miss.1983); *Tokman v. State*, 435 So.2d 664 (Miss.1983); *Hill v. State*, 432 So.2d 427 (Miss.1983); *Gilliard v. State*, 428 So.2d 576 (Miss. 1983); and *Smith v. State*, 419 So.2d 563 (Miss.1982). In *Henry v. Wainwright*, 721 F.2d 990 (5th Cir.1983), the Fifth Circuit Court of Appeals rejected the same constitutional arguments, holding that resolution of the issue was a question of state law.

C. *While Engaged in the Commission of the Crime of Kidnapping.*

Argument on this issue parallels Jordan's argument on Section B, next preceding. We answer that question as hereinabove, viz, this Court has decided it adversely to Jordan in *Billiot v. State*, 454 So.2d 445 (Miss.1984); *Wilcher v. State*, 448 So.2d 927 (Miss.1984); and *Leatherwood v. State*, 435 So.2d 645 (Miss.1983).

II.

THE DEFENDANT WAS SENTENCED TO DIE UNDER INSTRUCTIONS THAT UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF TO THE DEFENSE AND THAT FAILED TO INFORM THE JURY OF ITS DISCRETION TO EXERCISE MERCY.

III.

THE TRIAL COURT'S INSTRUCTIONS IMPROPERLY PERMITTED THE JURY TO SENTENCE DEFENDANT TO DEATH WITHOUT MAKING THE ESSENTIAL FINDING THAT HE INTENDED TO KILL, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Under Assignment II above, Jordan argues that the sentencing instructions were improper because they did not require the State to prove that the aggravating circumstances outweigh the mitigating circumstances be-

yond a reasonable doubt, and that they did not advise the jury that it had the authority to exercise mercy and return a life sentence regardless of its findings. These arguments are not new and have been presented to this Court previously. In *Gray v. Lucas*, 677 F.2d 1086 (5th Cir.1982), the Court addressed the same proposition raised here and resolved the question against Jordan's position. *See also Billiot v. State*, 454 So.2d 445 (Miss. 1984); *Wilcher v. State*, 448 So.2d 927 (Miss.1984); and *Hill v. State*, 432 So.2d 427 (Miss.1983).

As to the second part of the present assignment, it is beyond peradventure that instructions must be read and considered as a whole in analyzing whether they should be granted or denied. We have carefully considered Instruction S-1 and are of the opinion that it clearly and adequately charged the jury in such manner that the jury's discretion was channeled and guided. On the other hand, we are of the opinion that the proffered instruction by appellant would have removed such channeling and probably would have authorized the return of a verdict outside the scope of evidence, which could result in an uneven and prejudicial capital punishment. Therefore, we are of the opinion that the jury was properly instructed under this question. *See Irving v. State*, 441 So.2d 846 (Miss.1983); *Hill v. State*, 432 So.2d 427 (Miss.1983); and *Bullock v. State*, 391 So.2d 601 (Miss. 1980).

Under Assignment III, Jordan argues that the trial court erred in permitting the jury to sentence defendant to death without first requiring them to find that he intended to kill in violation of the United States Supreme Court's decision in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). Those courts which have been faced with this question have universally found that the death penalty is permissible where one of the four following conditions exists: (1) where the defendant actually kills, (2) where the defendant attempts

to kill, (3) where the defendant intends that a killing take place, or (4) where the defendant contemplated that lethal force would be employed. *See Reddix v. Thigpen*, 728 F.2d 705 (5th Cir.1984); *Drake v. Francis*, 727 F.2d 990 (11th Cir.1984); *Skillern v. Estelle*, 720 F.2d 839 (5th Cir.1983); *Henry v. Wainwright*, 721 F.2d 990 (5th Cir.1983); *Stephens v. Kemp*, 721 F.2d 1300 (11th Cir.1983); *Stanley v. Zant*, 697 F.2d 955 (11th Cir. 1983); *Ross v. Hopper*, 716 F.2d 1528 (11th Cir.1983); *Clark v. Louisiana State Penitentiary*, 697 F.2d 699 (5th Cir.1983); *Bell v. Watkins*, 692 F.2d 999 (5th Cir. 1982); *Irving v. State*, 441 So.2d 846 (Miss.1983); and *Leatherwood v. State*, 435 So.2d 645 (Miss.1983).

In the case at bar the jury found that Jordan killed, and also that Jordan contemplated lethal force be employed.

Therefore, we are of the opinion that there is no merit in this contention.

IV.

THE TRIAL COURT ERRONEOUSLY ADMITTED A TAPE RECORDED STATEMENT ELICITED FROM DEFENDANT IN THE ABSENCE OF APPOINTED COUNSEL.

Jordan requested an attorney prior to his preliminary hearing or arraignment, but after formal charges had been filed against him. The trial judge agreed that Jordan should have an attorney prior to his preliminary hearing, and sent him out with a bailiff. Shortly thereafter, Jordan was questioned by the police without counsel, the police not knowing that counsel had been appointed. Statements were made which were tape recorded and introduced into evidence at the trial over defense objections. Appellant argues that the statements should have been suppressed by the trial court at the resentencing hearing and at the Federal habeas corpus proceeding.

In *Jordan v. State*, 365 So.2d 1198 (Miss.1978), the Court, citing *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), stated:

> [T]he United States Supreme Court made it clear that an accused can voluntarily, knowingly and intelligently waive his right to counsel at an interrogation which occurs after counsel has been appointed, provided the prosecution has adequately carried its heavy burden to show that the waiver was knowingly and intelligently made.

365 So.2d at 1202.

The argument under this assignment was raised and the question was addressed in Jordan's petition for writ of habeas corpus. In passing on the question, the United States Court of Appeals in *Jordan v. Watkins*, 681 F.2d 1067, 1075 (5th Cir.1982) said:

> Appellant also argues that his right to counsel under the sixth and fourteenth amendments was violated by his interrogation in the absence of counsel after adversary proceedings had commenced. It is undisputed that adversary proceedings had commenced when the authorities elicited the recorded confession. "[O]nce adversary proceedings have commenced against an individual, he has the right to legal representation when the government interrogates him." *Brewer v. Williams*, 430 U.S. 387, 401, 97 S.Ct. 1232, 1240, 51 L.Ed.2d 424, 438 (1977). This does not mean that at that stage an accused cannot waive his rights under the sixth and fourteenth amendments. Id., 430 U.S. at 405-406, 97 S.Ct. at 1243, 51 L.Ed. at 441. Rather, it is "encumbent upon the [prosecution] to prove an intentional relinquishment of a known right or privilege." Id., 430 U.S. at 404, 97 S.Ct at 1242, 51 L.Ed. at 439. Based on the facts and circumstances previously discussed, we hold that the prosecution met this strict standard with respect to Jordan.

We are of the opinion that the State met its burden with respect to Jordan and that question is now *res judicata.*

V.

THE VOIR DIRE RESULTED IN A JURY SKEWED IN FAVOR OF SENTENCING THE DEFENDANT TO DEATH, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Jordan contends that (1) four jurors removed for cause did not make it unmistakeably clear that they would automatically vote against the death penalty without regard to the evidence and instruction of the court, (2) that the State followed a systematic practice of peremptorily excusing jurors who expressed qualified reservations against the death penalty, and (3) that the death qualification of the jury had the effect of creating a hanging jury.

Juror Jones, Juror Belvin, Juror Lyons and Juror Osswald, were all excused for cause. All of those veniremen, except Juror Jones, stated without equivocation that they were opposed under the circumstances to the imposition of the death penalty. Juror Jones equivocated in her responses, but ultimately stated, and, from the totality of her responses, it was reflected that she absolutely opposed the infliction of the death penalty.

The landmark case on this question is *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), where the United States Supreme Court held:

> [A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

391 U.S. at 522, 88 S.Ct. at 1777, 20 L.Ed.2d at 784-85.

In *Williams v. Maggio*, 679 F.2d 381 (5th Cir.1982), the Court said:

> By means of this appeal, petitioner asks this Court to narrow further the stiff requirements of *Witherspoon* and its progeny and, in this Court's opinion, thereby infringes the State's right to an impartial jury that is willing to consider all penalties provided by law. According to petitioner's analysis, exclusion of a venireman is impermissible unless he states in response to all questions that he absolutely refuses to consider the death penalty. An equivalent response framed in any other reasonable manner is judged to demonstrate that the individual's position is not firm. We reject such a rigid, unthinking interpretation of *Witherspoon*. Form will not be placed over substance.

679 F.2d at 386. *See also Porter v. Estelle*, 709 F.2d 944 (5th Cir.1983).

After carefully scrutinizing the voir dire examination of the jurors, we are of the opinion that the jury was lawfully and properly selected and impaneled, and we reject the contentions of the appellant on this assignment. *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); *Willis v. Zant*, 720 F.2d 1212 (11th Cir. 1983); *Washington v. Watkins*, 655 F.2d 1346 (5th Cir. 1981) *reh.* and *reh. en banc den.* 662 F.2d 1116 (1981); *United States v. Carlton*, 456 F.2d 207 (5th Cir.1972).

VI.

THE PROSECUTOR'S CLOSING ARGUMENT INCLUDED NUMEROUS REFERENCES TO THE DEFENDANT'S PRIOR EXERCISE OF HIS FIFTH AMENDMENT RIGHT NOT TO TESTIFY AS WELL AS OTHER HIGHLY IMPROPER AND PREJUDICIAL REMARKS.

The record from the two previous trials reflects that Jordan elected not to testify at either the guilt or sen-

tencing phases. Upon the resentencing hearing in the present case, Jordan testified in his own behalf and attempted to convince the jury that he did not intentionally kill Mrs. Marter. In closing argument, the prosecutor made the following remarks relative to Jordan's testimony and the fact that this was the first time he had testified in explanation of the killing:

> Through the entire procedure that we employed here, at another time and another place we presented this case, and the Jury found him guilty. We were required to do so as we went through that process of convicting him of guilt. Now the time comes for the sentencing, and we see Mr. Jordan come up on the stand. Six years. He takes the stand and he says, I'm a changed man; I didn't mean to do what I did. You finally got me convicted; now you got me in the box; it's getting close to the penalty stage; I'm going to play on your sympathy, I'm going to play on your mercy, I'm going to play on your bias. I'm a changed man. I didn't mean to do what I did. It was an accident, and I'm sorry because I have found the Lord.
>
> * * * * * *
>
> . . . Another thing that is bothering me, and has bothered me since 1976—and I have never had to face this problem until Mr. Jordan took the stand. . . .
>
> * * * * * *
>
> . . . Many many years we have worked on this case waiting for this very minute, and I'll be dadgum it, if he doesn't take the witness stand and say "I'm sorry'; "I'm sorry that I did it, and I think I ought to have life imprisonment." See, because when I was a little boy I wasn't a bad fellow.

Jordan contends that the closing arguments of the prosecuting attorney were improper and prejudical because they related to the exercise of his Fifth Amend-

ment right not to testify in the previous trials. He relies in principal on *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) *reh. den.* 381 U.S. 957, 85 S.Ct. 1797, 14 L.Ed.2d 730. There, Griffin chose not to testify during the guilt phase of his bifurcated trial, but did testify at the sentencing hearing. The trial judge instructed the jury that it was permissible to draw unfavorable inferences from the defendant's failure to testify. The prosecutor's comment and the judge's instruction were on the issue of guilt that occurred before the jury reached its verdict. We distinguish that case from the case sub judice. In *Calloway v. Wainwright*, 409 F.2d 59 (5th Cir.1968), the Court said:

> It is clear that when a defendant voluntarily testifies to the merits, and not just upon a purely collateral matter, the prosecutor may comment upon the defendant's failure to deny or explain incriminating facts already in evidence.

409 F.2d at 65.

In *Tucker v. Francis*, 723 F.2d 1504, 1511-12 (11th Cir.1984), the Court addressed the question in the following language:

> It is not fundamentally unfair to comment on the appellant's silence during the culpability phase as juxtaposed with his exculpatory testimony during the sentencing phase. A defendant is usually told that so long as he does not testify, his failure to testify will not be used against him. In this case, Richard Tucker's failure to testify was not used against him during that portion of his trial in which he invoked the fifth amendment. After he waived his fifth amendment privilege by testifying, any expectations of protection from adverse comment also were waived.

See also Raffel v. United States, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054 (1926); *McGahee v. Massey*, 667 F.2d 1357 (11th Cir.1982) on waiver.

We are of the opinion that the remarks of the prosecuting attorney did not constitute error, and, at the most, were harmless error.

VII.

THE DEFENDANT WAS SENTENCED UNDER A DEATH PENALTY STATUTE THAT DID NOT EXIST WHEN HE COMMITTED THE CAPITAL MURDER OR WHEN HE WAS ORIGINALLY TRIED, IN VIOLATION OF THE EX POST FACTO CLAUSES OF THE UNITED STATES AND MISSISSIPPI CONSTITUTIONS, AS WELL AS SECTION 99-19-1 OF THE MISSISSIPPI CODE.

Jordan contends here that his sentence of death is in violation of the ex post facto clauses of the United States and Mississippi Constitutions and Mississippi Code Annotated § 99-19-1 (1972). The very question was answered adversely to appellant in *Irving v. State*, 441 So.2d 846 (Miss.1983). The Court said:

> [W]e are of the opinion appellant has misapplied § 99-19-1. By its terms, the statute comes to life only with respect to statutory changes "affecting the crime or its punishment." The 1977 amendments did not affect the substance of capital law but merely made changes in the procedures by which such cases were to be tried. Therefore, we do not find § 99-19-1 requires reversal in this case.
>
> * * * * * *
>
> . . . [T]he new statutes provided increased protection for capital defendants and the intent that all such defendants on trial after April 1977, should merit this protection. We are of the opinion the ex post facto contention is without merit.

441 So.2d at 852, 853.

In *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), the Court stated:

> [T]he change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime.
>
> * * * * * *
>
> In this case, not only was the change in the law procedural, it was ameliorative. It is axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law.

432 U.S. at 293-94, 97 S.Ct. at 2298-99.

The question was likewise decided in *Gray v. State*, 351 So.2d 1342 (Miss. 1977).

VIII.

THE TRIAL COURT ERRED BY REFUSING TO GRANT THE DEFENDANT AN EVIDENTIARY HEARING TO SUBSTANTIATE HIS CLAIM THAT THE DEATH PENALTY IS APPLIED IN MISSISSIPPI IN A DISCRIMINATORY MANNER BASED UPON THE RACE OF THE VICTIM.

Jordan contends that he was entitled to an evidentiary hearing to substantiate his claim that the death penalty is applied in Mississippi in a discriminatory manner based upon the race of the victim. The appellee states in its brief, "The allegation that the trial court denied defendant an evidentiary hearing to substantiate his claim that Mississippi has applied the death penalty in a racially discriminatory fashion is not only without support in the record, but also a blatant misstatement of the facts." Pages 216-22 of the record are cited as relating to argument on motion for evidentiary hearing. However, the motion discussed there (R. 216), related to a motion to

impose a life sentence. At the conclusion of the discussion (argument), counsel for Jordan stated:

> BY MR. HUDSON:
>
> Your Honor, you had indicated prior to our starting that you were prepared to rule on our motion; the one that is pending on the imposition of the life sentence. We would ask that the court rule and the court give us an opinion on this decision.
>
> BY THE COURT:
>
> In my opinion, based upon the decision of the Fifth Circuit in remanding this matter back to be tried on the penalty phase, I feel like that I must overrule your motion and submit it to the jury on the issue of the penalty.

Therefore, it appears that Jordan's counsel did not press for hearing and ruling on the motion for an evidentiary hearing. In *Booker v. State*, 449 So.2d 209 (Miss.1984), this Court said:

> The appellant next contends that the arbitrary and discriminatory imposition of the death penalty in this case violates the Eighth and Fourteenth Amendments. Specifically, he contends that Blacks are much more likely to receive the death penalty than Whites.
>
> Although the appellant raised this issue in his motion for a new trial, he failed to introduce any evidence in support of the contention. In *Gordon v. State*, 349 So.2d 554 (Miss.1977), this Court held:
>
> > The general rule is that a motion is at issue without any further pleading, but the allegations thereof do not amount to any proof of the facts stated therein. *Shaw v. State*, 188 Miss. 549, 195 So. 581 (1940). It devolves upon the movant to support his motion by proof. *Reed v. State*, 143 Miss. 686, 109 So. 715 (1926). It is also the

> rule that in the absence of proof in support of a motion, the presumption in favor of the correctness of the action of the trial court must prevail. *Walters v. State*, 127 Miss. 324, 90 So. 76 (1921).

449 So.2d at 221.[2]

We are of the opinion that there is no merit in this assignment of error.

IX.

DEFENSE COUNSEL WAS IMPERMISSIBLY RESTRICTED IN THE PRESENTATION OF MITIGATING EVIDENCE.

Jordan contends that the lower court impermissibly restricted testimony concerning mitigating facts which constitute reversible error. The witnesses are Robert Jordan, brother of appellant; Shirley Thames, first cousin; Lucius Brown, prison guard; and Rhett Russell.

The testimony of Robert H. Jordan consists of six record pages. He told about his relationship with appellant from boyhood through manhood. A sample of his testimony follows:

> Well, I can state for a fact that my brother's a very fine man. We had a good relationship. He was a good man in the community, and he raised a good family. He went to church regular.

Following that testimony, Robert H. Jordan made a more detailed statement in which he complimented and lauded his brother as a good man.

Testimony objected to by the State was whether or not Robert H. Jordan knew his brother's reputation for peace and violence in the community and the trial judge permitted him to answer that question in the affirmative and

---

[2] Jordan and Mrs. Marter are members of the white race.

state that the reputation was good. The only other objection was to testimony of the witness to the effect that "Well, I don't know. I believe that they should be . . ." An objection was sustained as to what the witness believed and thought.

The direct examination of Shirley Thames consumes eight (8) pages of the record. She testified at length about the family background and life of Jordan when he was growing up. Objections were sustained to an answer of Mrs. Thames when she stated that Jordan was brought up in the church by his parents and then that she had never been in church service with him at any time; also, objections were sustained to the questions "What problem for your family has this matter created?" and, "Do you know, Mrs. Thames, about the family relationship between Gerald Jordan and his wife?"

The testimony of Officer Lucius Brown of the Maximum Security Unit consists of five (5) pages. He testified that he had requested, and appointed, Jordan as his hall man. He explained Jordan's duties in that capacity and was highly complimentary of everything Jordan did. Objections were sustained to questions asked Officer Brown as to placing trust in a person selected for the job of hall man, whether Jordan had demonstrated any violent tendencies in Maximum Security (question answered in the negative), questions as to how he would characterize Jordan's attitude, what the reputation of Jordan was for peace and violence in the Maximum Security Unit, and questions as to whether or not Jordan can be rehabilitated, and whether or not Jordan had engaged in fights on the yard.

Rhett Russell was called by the defense as a witness and, at a bench conference, the trial judge was informed of the substance of his testimony, the State objected thereto, and the court sustained the objection. Whereupon, the defense made the following proffer of Russell's testimony:

BY THE COURT: Let the record show that Defense Counsel has offered the Honorable Rhett Russell as a witness. We had a conference here at the bench and I was informed a little about what he would testify to. And the State objected to it and I sustained it. But I have offered the Defense Attorneys an opportunity to make a record on his testimony.

BY MR. KILBRETH: Your Honor, if permitted to testify, Mr. Russell would testify about a method for generating electricity from an alternative energy source, as it is known; through wind tunnels and things of that nature. Mr. Jordan has been in contact with the Tennessee Valley Authority over this invention and has entered into an agreement with them about it. And Mr. Russell is familiar with all those details and would testify about that.

BY THE COURT: This is some thoughts and ideas that have been developed by Mr. Jordan since he has been in prison; is that right?

BY MR. KILBRETH: That is correct, Your Honor.

In *Jackson v. State*, at page 1256 (1976), this Court said:

> [T]he defendant . . . may also adduce proof of any other circumstance or combination of circumstances surrounding his life and character or the commission of the offense with which he is charged that would be reasonably relevant to the question of whether he should suffer death or be sentenced to life in prison.

The United States Supreme Court said in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978):

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's charac-

> ter or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

438 U.S. at 605, 98 S.Ct. at 2964-65, 57 L.Ed.2d at 990. *See also Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

The question presented here is whether or not the testimony proposed to be introduced, and which was excluded by the lower court, was competent and reasonably relevant to the question of whether or not Jordan should suffer death or be sentenced to life in prison. Robert Jordan, Shirley Thames, and Officer Lucius Brown testified in detail as to circumstances surrounding the life and character of Jordan. Objections to certain questions were sustained, and we think properly so, because they were not competent and reasonably relevant to the issue.

Referring to the above statement of the court in sustaining an objection to the testimony of Rhett Russell, it appears that the court offered the defense attorney an opportunity to make a record on his testimony. The record does not indicate what was said to the judge at the bench conference about the testimony of Russell. Instead of making a record as permitted by the court, appellant's counsel made a proffer of what was intended to be shown by Russell's testimony. From that proffer, it appears that his testimony would have been hearsay and inadmissible. However, we are of the opinion that such testimony would not be reasonably relevant to the question of whether Jordan should suffer death or be sentenced to life imprisonment.

Jordan took the stand and testified at length in his own behalf. He was not interrogated by his counsel as to, nor did he attempt to testify to, the matters sought to be elicited from Rhett Russell. Had Jordan so testified, it would not have been objectionable on the ground of hearsay testimony, and he may have been able to establish it as being relevant in his behalf. Having failed to offer

such testimony in evidence, we do not think that he can now complain that the court erred in excluding the testimony of Russell. Therefore, we hold that the lower court did not commit reversible error in excluding the testimony under this assignment.

X.

THE TRIAL JUDGE ERRED IN ADMITTING THE OPINION TESTIMONY OF DAVE MELTON, A NON-EXPERT, WITHOUT FIRST ALLOWING VOIR DIRE AS TO HIS QUALIFICATIONS.

Jordan contends that the witness Dave Melton was not qualified as an expert for the State and that admitting his testimony constituted reversible error, particularly since the court did not permit Jordan's counsel to voir dire Melton before he testified. The court permitted Melton to testify about bloodstains and blood spatters found at the scene of the homicide. The record reflects that he had a week's training in 1973 under a Dr. McDonald, who was an authority in such field, and that he had on-the-job experience since that time. We have read the record carefully scrutinizing the qualifications and testimony of Mr. Melton, and we are satisfied that the lower court committed no reversible error in permitting him to testify as an expert. In *Waycaster v. State*, 185 Miss. 25, 187 So. 205 (1939), the Court stated: "[T]he trial court determines the competency of the witnesses, whether expert or non-expert, to testify, and the weight to be given to the opinion of the witness, if competent, is for the jury alone." 185 Miss. at 35, 187 So. at 208.

In *Grinnell v. State*, 230 So.2d 555 (Miss.1970), the Court said:

> The rule is well established that the question of the qualification of a witness to speak as an expert lies largely in the discretion of the trial court, and its determination that a witness is qualified to speak will not be reversed unless it clearly appears that the

> witness was not qualified. . . . The jury, of course, was free to accept or disregard it.

230 So.2d at 557-558.

In *Floyd v. State*, 166 Miss. 15, 148 So. 226 (1933), this Court said: "[T]o testify as an expert a witness need not be infallible, or possess the highest degree of skill, it being generally sufficient that he possess peculiar knowledge respecting matter involved not likely to be possessed by the ordinary layman." 166 Miss. at 37, 148 So. at 231.

The proper procedure and policy when an expert witness is offered is for the court to permit qualification by the party offering the expert witness, and then to permit voir dire by the opposite party before ruling on the competency of the witness. Here, the failure of the lower court to follow that procedure does not constitute reversible error. During cross-examination, Jordan's counsel thoroughly interrogated Melton about his training and experience, then cross-examined him concerning his direct testimony. Counsel apparently was satisfied at that time with his competency because he did not renew his objection to the testimony or move to exclude such testimony. Further, a layman or a member of the jury, after hearing and seeing a description of the bloodstains, using common knowledge and experience, could have arrived at the same conclusion of Melton. We find no prejudice resulting to the appellant Jordan for failure of the lower court to permit his counsel to voir dire Melton at the outset of his testimony.

XI.

THE DEATH PENALTY IMPOSED IN THIS CASE IS DISPROPORTIONATE TO THE PENALTIES IMPOSED IN OTHER CAPITAL MURDER CASES IN MISSISSPPI.

Jordan contends under this assignment (1) that this Court has interpreted the statute too narrowly by confining its proportionality review to cases in which the

death penalty was imposed. In *Pulley v. Harris*, —— U.S. ——, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), the Court held that such a review is not constitutionally mandated. In *Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982), the Fifth Circuit said:

> Gray claims that the Mississippi Supreme Court's comparative review of death sentences is flawed since the court only compared Gray's case with those cases where the death sentence had been imposed and not with all the cases where it could have been imposed. Because the Supreme Court has rejected a similar argument in *Proffitt v. Florida*, 428 U.S. 242, 258-59 fn. 16, 96 S.Ct. 2960, 2969-70 fn. 16, 49 L.Ed.2d 913 (1976), we reject this claim as well.

677 F.2d at 1111.

Jordan contends (2) that even if this Court reviews only cases in which the death penalty was imposed, it should conclude that the death sentence is excessive and disproportionate in this case. In *Jordan v. State*, 365 So.2d 1198, 1206, 1207 (Miss. 1978), decided November 22, 1978, this Court reviewed Mississippi cases to that time for the purpose of determining whether or not the sentence of death was excessive and disproportionate as to Jordan. We now have reviewed those cases under consideration by this Court since *Jordan, supra*, and both reviews have convinced us that the death penalty here is not excessive when the aggravating and mitigating circumstances are weighed against each other and that infliction of the death penalty here will not be either wanton or freakish and will be consistent and even-handed with other death penalty cases previously affirmed by this Court. Therefore, we reject this assignment of error.

Finding that there are no reversible errors in the record, the judgment of the lower court is affirmed and Wednesday, the 6th day of March, 1985, is fixed as the

date for execution of the death penalty in the manner provided by law.

AFFIRMED.

PATTERSON, C.J., WALKER, P.J., and HAWKINS, DAN M. LEE, PRATHER, ROBERTSON, SULLIVAN and ANDERSON, JJ., concur as to Parts I-VIII, and Parts X-XI.

As to Part IX: PATTERSON, C.J., WALKER, P.J., and DAN M. LEE, and ANDERSON, JJ., concur.

ROBERTSON, HAWKINS, SULLIVAN and PRATHER, JJ., dissent.

ROBERTSON, Justice, concurring in part, dissenting in part.

Though much dust remains to be settled in the increasingly complex area of death penalty litigation, the ground rules in one area have been made reasonably clear. At the sentencing hearing, the convicted capital murderer may offer almost anything which in *his* view might move one or more jurors to vote against the penalty of death.

The point was most authoritatively put in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978):

> The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the defense that the defendant offers as a basis for a sentence less than death.
>
> 438 U.S. at 604, 98 S.Ct. at 2964-2965, 57 L.E.2d at 990.

The rule was reaffirmed in *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and in numerous cases since then.

The record reflects that at the sentencing hearing below Jordan offered to prove that he had invented a unique method of generating electricity from an alternative energy source through the use of wind tunnels and that he had entered into an agreement with the Tennessee Valley Authority with respect to the development and use of that invention. This was an invention developed by Jordan since he has been incarcerated at the maximum security unit at the Mississippi State Penitentiary. The obvious purpose of the testimony was to show a positive side of Jordan's character, that he had made an important contribution to society and, presumably, that he was capable of making further such contributions.

In the hands of skillful defense counsel, the point, of course, could have been argued in various ways. That Jordan had made the invention after he was in prison is arguably evidence of a changed person who is committed to seeking atonement for his crimes by doing good. That Jordan was able to do this while incarcerated at the maximum security unit at the Mississippi State Penitentiary demonstrates that Jordan has the resourcefulness to make such beneficial contributions while confined, that putting him back on the streets is unnecessary to enable him to perform his acts of atonement.

The problem here is that the trial judge did not allow the testimony.

I am confident that there is not a single member of this court who, had he or she been sitting as the trial judge in this case, would have precluded the offering of the evidence in question. Because the trial judge was correct on all other points and because this case has been dragging on for so long,[1] I do not think it unfair or in-

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[1] Originally, Jordan was indicted March 26, 1976, for a killing that occurred January 13, 1976. He was prosecuted, convicted and sentenced to death at a trial which ended July 21, 1976. His motion for a new trial was sustained October 27, 1976, in view of *Jackson v. State*, 337 So.2d 1242 (Miss.1976). At retrial Jordan was again

accurate to suggest that the majority has succumbed to the quite human temptation to sweep this error under the rug and, if you will, cut a corner or two. I will try briefly to demonstrate my point.

To begin with, the fact that Jordan has made his invention since the commission of the crime and since his incarceration certainly does not deprive the evidence of admissibility. We have held repeatedly that *bad* things that a capital defendant does *after* his crime may be shown as aggravating circumstances. *See, e.g., Tokman v. State,* 435 So.2d 664, 668 (Miss.1983); *Jones v. State,* 381 So.2d 983, 994 (Miss.1980). It certainly follows that *good* things the defendant does *after* the commission of his crime may be shown in mitigation.

Several of our sister states have considered whether evidence that a defendant has attempted to rehabilitate himself or be productive with his time while in prison is a mitigating circumstance and each has held that such evidence may be so considered. For example, Arizona has read *Lockett* and *Eddings* to require consideration by the sentencer of evidence that the defendant had done a great deal of soul searching since the crime, had been a model prisoner, had set positive new goals for himself

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sentenced to death. His direct appeal to this Court affirmed his sentence. *Jordan v. State,* 365 So.2d 1198, 1207 (Miss.1979) (rehearing denied without opinion). Petition for Writ of Certiorari to the United States Supreme Court was denied. *Jordan v. State,* 444 U.S. 885, 100 S.Ct. 175, 62 L.E.2d 114 (1979). Jordan's petition to this Court for error corum nobis relief was denied. *In re Jordan,* 390 So.2d 584, 588 (Miss.1980). While state error corum nobis proceedings were pending, Jordan filed a federal habeas corpus action in the Southern District of Mississippi. When the District Court denied relief without published opinion, appeal was taken to the Fifth Circuit Court of Appeals where Jordan's death sentence was vacated. *Jordan v. Watkins,* 681 F.2d 1067, 1083, *reh'g denied sub nom. Jordan v. Thigpen,* 688 F.2d 395, 396 (5th Cir.1982). At the resentencing hearing on April 29, 1983, Jordan was again sentenced to death. It is this sentence he appeals here.

and had attempted to further his education while incarcerated. *State v. Gretzler*, 135 Ariz. 42, 58, 659 P.2d 1, 14 (1983); *State v. Watson*, 129 Ariz. 60, 63-64, 628 P.2d 943, 947 (1981).

South Carolina holds that a capital defendant's behavior while in prison "is relevant because it does bear upon a defendant's character". *State v. Stewart*, 320 S.E.2d 447, 450 (S.C.1984). Moreover, Florida has construed *Lockett* to mean that

> a person's potential for rehabilitation is an element of his character and therefore may not be excluded from consideration as a possible mitigating factor.
>
> *Simmons v. State*, 419 So.2d 316, 320 (Fla.1982)

Evidence of future dangerousness is relevant as an aggravating circumstance, as we have held in *Leatherwood v. State*, 435 So.2d 645, 652 (Miss.1983). *Leatherwood* relies upon *Jones v. State* which states:

> In our opinion, the legislature undoubtedly intended a weighing of both at the time of sentencing so the past behavorial patterns likely to affect the defendant's future behavior might be evaluated by the jury in deciding whether the defendant will live or die. We think there is no more justification for terminating consideration of the defendant's criminal behavior at the time of the offense than there is for terminating consideration of favorable behavior at that time.
>
> —381 So.2d 983, 994 (Miss.1980) (Walker, J.); *see Reddix v. State*, 381 So.2d 999, 1010 (Miss. 1980) (quoting *Jones*).

As *Jones* indicates, it surely follows that evidence of a potential for doing good in the future is likewise relevant.

At trial Jordan attempted to offer the evidence of his invention through a witness named Rhett Russell. One of the inadequacies the majority finds in the proffered evidence is the notion that Russell's testimony "would have

been hearsay and inadmissible". For two reasons, the point won't wash. First, because the nature of the sentencing hearing is unique, we are constitutionally prohibited from a "mechanistic" enforcement of the hearsay rule. *Green v. Georgia*, 442 U.S. 95, 97, 99 S.Ct. 2150, 2151-52, 60 L.Ed.2d 738, 741 (1979). Second, there is nothing in the record from which the majority could rationally conclude that Russell's testimony would have been hearsay. The proffer made by defense counsel was that "Mr. Russell is familiar with all those details and would testify about that". Nothing in the record suggests that the trial judge regarded Mr. Russell's proffered testimony as hearsay or rejected it on that basis.

Another red herring invoked by the majority is that Jordan took the stand and testified at length on his own behalf but did not attempt to describe the invention at issue here. There are two altogether sufficient answers here as well. First, we know of no rule of law under which an error in refusal of admission of competent evidence would be said to be cured by the fact that the party had another, subsequent opportunity to offer the same evidence and failed to do so. The majority cites neither authority nor logic for its point and we suggest that none may be found.

There is a more practical answer to the majority's point. Defense counsel offered the Russell testimony *prior* to calling Jordan as a witness in his own behalf. In spite of the majority's speculations about hearsay, it is clear from the record that the trial judge refused this testimony on its merits; that is, he regarded the testimony as objectionable on relevancy grounds, not form. Defense counsel reasonably should have regarded that the trial court had held that evidence of the invention was inadmissible, period. Indeed, there is no other reasonable interpretation of the state of things following the trial court's ruling on the Russell testimony. Seen in this light, the majority can only be saying that trial counsel should

be faulted for failing to continue to press a point of law upon which the trial judge had already ruled. Although it would not have been improper for defense counsel to "try again", no waiver attaches to the point when all counsel does is show respect for the trial court and its prior rulings. *See Stong v. Freeman Truck Line, Inc.*, 456 So.2d 698, 711 (Miss.1984); *Jones v. State*, 461 So. 2d 686, 702 (Miss.1984).

Our law is clear that, when a party seeks to offer testimony and that testimony is rejected by the trial judge, that party, if he wishes to preserve the point for appeal, must place in the record the substance of what the excluded testimony would have been. *See, e.g., Dazet v. Bass*, 254 So.2d 183, 187-188 (Miss.1971). This is for the obvious purpose of enabling this Court on appeal to consider whether the excluded testimony was of any real consequence.

Our law is also clear that the party may make his offer of proof in one of two forms. First, he may call the witness outside the hearing of the jury and in question-and-answer form present what the testimony would have been. Alternatively, counsel may simply state for the record that if the witness had been allowed to testify, he would have stated such and such, setting forth the general outlines of the proffered testimony. We emphasize the availability of this latter procedure, for the majority appears to fault Jordan for not making his proffer in question-and-answer form.

We have repeatedly recognized that a wholly effective, albeit alternative, method of preserving an exclusion of evidence point for appeal is dictation into the record of "a statement . . . to indicate what was proposed to be shown by the examination." *McGee v. State*, 365 So.2d 302, 304 (Miss.1978); *see also Bell v. State*, 443 So.2d 16, 20 (Miss.1983); *Martin v. Wadlington*, 337 So.2d 706, 708 (Miss.1976); *Kinney v. State*, 336 So.2d 493, 495 (Miss.1976).

In *Murray v. Payne*, 437 So.2d 47 (Miss.1983), we summed up the matter.

> All we require is that the party offering the excluded testimony make a clear record showing to us that there is substance to his point, that on reversal and remand there is a substantial likelihood that he will be able to offer evidence which may reasonably be expected to have an impact on the outcome of the case. We do not require that the appealing party place in the record the total and complete details of the proffered but excluded testimony. Nor do we require certainty that exclusion of that testimony affected the outcome of the first trial. 437 So.2d at 55.

In *Murray* we even expressed our preference for the statement by counsel method of preserving the record, referring to examination of the witness as "the more cumbersome" method. 437 So.2d at 55.

In the case at bar, the defense sought to call Rhett Russell as a witness. A bench conference was held whereupon the trial judge remarked

> I was informed a little about what he would testify to. And the State objected to it and I sustained it. But I have offered the defense attorneys an opportunity to make a record on his testimony.

At this point, defense counsel stated for the record that:

> If permitted to testify, Mr. Russell would testify about a method for generating electricity from an alternative energy source, as it is known; through wind tunnels and things of that nature. Mr. Jordan has been in contact with the Tennessee Valley Authority over this invention and has entered into an agreement with them about it. And Mr. Russell is familiar with all those details and would testify about that.

This is a perfectly acceptable proffer, no doubt comparable to many which we have held sufficient to preserve an evidentiary exclusion point for consideration on appeal.

The bottom line holding of the majority is:

> We are of the opinion that such testimony would not be reasonably relevant to the question of whether Jordan should suffer death or be sentenced to life imprisonment.

No basis in fact, reason or legal authority is offered for this conclusion. Why is evidence that Jordan may have made a useful invention—and presumably, has the ability to make more—not relevant to the question of whether he should suffer death? We are simply not told.

It is with a certain amount of awe that any person contemplates the matter of whether he should vote that a fellow human being should die. What factors inform the making of that decision will no doubt differ from one person to the next. Having been required to consider more than half a hundred cases from across this state wherein some juries have decided that capital murderers should die and others on seemingly comparable facts have decided that other capital murderers should live, I will certainly not presume to know any authoritative check list of just what goes through a juror's mind when facing this decision.

I can say with confidence, however, that there are not just a few persons within our society who, faced as a juror with a life or death determination, would regard it as relevant that the defendant, since his crime and incarceration, had applied his wit and ingenuity and made an invention that would benefit society. Not all of us are without the capacity to see as proper the amelioration of the harshness of the law in the face of genuine repentence, pursuit of atonement and demonstrably responsible behavior.

What is most disturbing about the majority decision is that it would, if carried to its logical extreme in the future, operate as a matter of law to deprive society of the benefits it could well derive from the continued life of one convicted of capital murder. History has recorded the names of numbers of persons who have in their youth committed heinous and atrocious crimes and, escaping the hangman, gone on to lead productive and useful lives, albeit behind bars. Nathan Leopold participated in the thrill killing of little Bobby Franks in Chicago in the early 1920s and, after he escaped the gallows largely through the eloquence of Clarence Darrow, went on to make important humanitarian contributions in the fields of science and medicine. N. Leopold, *Life plus 99 Years* 305-38 (1958). Several decades ago there was popularized the life of Robert Stroud, the birdman of Alcatraz, a convicted murderer, who following reprieve made important contributions to avarian science. There have no doubt been others. While most capital murderers do not have such creative capacities in their character and personality, there is no reason why we should arbitrarily deprive society of the benefits of the continued life of those who do.

The point, in a nutshell, is this. One of the fundamental thrusts of the last ten years of death penalty litigation has been establishment of the premise that the awesome decision of life or death should be committed to the jury as a representative of the collective conscience of the community. Through juries the contemporary values of society are infused into the decision making process. *Gregg v. Georgia*, 428 U.S. 153, 179-182, 96 S.Ct. 2909, 2928-29, 49 L.Ed.2d 859, 878-79 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 295, 96 S.Ct. 2978, 2986-87, 49 L.Ed.2d 944, 955-956 (1976). We have been quick to reject efforts to infuse arbitrary factors into the sentencing process, factors that would deflect from the jury any substantial part of its awesome decision-making responsibility in death penalty cases. *Wiley v. State*, 449

So.2d 756, 761-763 (Miss.1984); *Williams v. State*, 445 So.2d 798, 810-814 (Miss.1984).

It is in the foregoing context that we recall the mandate of *Lockett* and *Eddings* that the sentencing jury

> not be precluded from considering, as a mitigating factor, any aspect of the defendant's character . . . that the defendant offers as a basis for a sentence less than death.
>
> 438 U.S. at 604, 98 S.Ct. at 2964-65, 57 L.Ed.2d at 990.

For this Court to hold as a matter of law that the making of a socially useful invention is not a relevant mitigating circumstance is at absolute cross purposes with the force of the logic of *Gregg* and *Woodson* and *Lockett* and *Eddings* and all of the others. More important, it is, as we perceive the present state of the law, constitutionally impermissible, with the unfortunate ultimate result that this case is now destined to drag on even longer than would have been the case had the majority been willing to bite the bullet and correctly apply *Lockett* to the facts at hand.

I concur in what has been said by the majority on all other issues, I would hold, however, that the trial judge impermissibly restricted Jordan in his presentation of mitigating circumstances. I would reverse and remand for a new hearing on the question of sentence where Jordan's rights under *Lockett* and *Eddings* would be fully respected.

HAWKINS, PRATHER and SULLIVAN, join this opinion.

HAWKINS, Justice, joining Justice ROBERTSON:

I am compelled to join Justice Robertson in what I must view as unassailable reasoning.

Justice Robertson names men who significantly contributed to humanity despite having previously committed murder. Diffidently, I would add two more, David [1] and Solomon.[2]

History repeatedly teaches us that humanity's benefactors have not been limited to those mortals who never committed serious transgressions or were totally sane.

The jury was entitled to hear this testimony.

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[1] II Samuel 11:14-17 (his lover's husband).

[2] I Kings 2:22-25 (his half brother).

IN THE SUPREME COURT OF MISSISSIPPI

DECISIONS HANDED DOWN JANUARY 30, 1985

* * * *

ROY NOBLE LEE, P.J.

XXX 55,493 Richard Gerald Jordan v. State; Circuit, Harrison; Conviction of Capital Murder and Sentence of Death Affirmed. Wednesday, March 6, 1985, Set for Execution of the Death Penalty as Provided by Law. Patterson, C.J., Walker, P.J., Hawkins, Dan Lee, Prather, Robertson, Sullivan and Anderson, JJ., Concur as to Parts I-VIII, and Parts X-XI. As to Part IX: Patterson, C.J., Walker, P.J., Dan Lee and Anderson, JJ., Concur. Robertson, Hawkins, Sullivan and Prather, JJ., Dissent.

* * * *

ONLY CASES MARKED "X"
HAVE WRITTEN OPINIONS.

Respectfully submitted,

ROBERT E. WOMACK, Clerk
YVONNE P. BURNHAM, D. C.

IN THE SUPREME COURT OF MISSISSIPPI

No. 55,493

RICHARD GERALD JORDAN

v.

STATE OF MISSISSIPPI

ORDER STAYING EXECUTION

The Court having considered the Motion for Stay of Execution filed by the appellant, the date of execution being set for Wednesday, March 6, 1985, and, finding that the appellant has filed a Petition for Rehearing in this Court;

IT IS, THEREFORE, ORDERED that the execution of the apellant be stayed pending final disposition of said Petition for Rehearing and further order of this Court.

SO ORDERED this the *4th* day of March, 1985.

/s/ Roy Noble Lee
ROY NOBLE LEE
Presiding Justice

ATTEST

A TRUE COPY
This the 4th day of
March, 1985

ROBERT E. WOMACK, Clerk
SUPREME COURT OF MISSISSIPPI

By /s/ S. Brunt

IN THE SUPREME COURT OF MISSISSIPPI

DECISIONS HANDED DOWN MARCH 13, 1985

* * * *

THE COURT SITTING EN BANC:

* * * *

55,493 Richard Gerald Jordan v. State; Circuit, Harrison; Petition for Rehearing Denied. As to Part IX: Hawkins, Prather, Robertson and Sullivan, JJ., Dissent.

* * * *.

ONLY CASES MARKED "X"
HAVE WRITTEN OPINIONS

Respectfully submitted,

ROBERT E. WOMACK, Clerk
YVONNE P. BURNHAM, D. C.

IN THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

No. 18,807

STATE OF MISSISSIPPI,
Plaintiff

v.

RICHARD GERALD JORDAN,
Defendant

---

[61] MOTION TO PRECLUDE CONSIDERATION OF MISS. CODE ANN. § 99-19-101(5)(h)

Comes now the defendant, Richard Gerald Jordan, by his attorneys, and respectfully requests that the Court enter an order preventing the state from relying in any way on the aggravating circumstance that "[t]he capital offense was especially heinous, atrocious or cruel," Miss. Code Ann. § 99-19-101(5)(h) (Cum. Supp. 1982). This motion is made pursuant to the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States and pursuant to Miss. Code Ann. § 97-3-19, 99-19-101 (Cum. Supp. 1982). In support of this motion, defendant says the following:

1. *Eighth Amendment.* Under both the Eighth Amendment and Mississippi law, a crime may be characterized as "heinous, atrocious or cruel" only if it is a conscienceless or pitiless crime that is unnecessarily torturous to the victim.

2. The undisputed evidence at the previous trials showed that Mrs. Marter was killed instantaneously [62] by a single gunshot wound in the head. The District Attorney has, in the court-ordered discovery, indicated that on this point he will present no witnesses or evidence not presented at the previous trials. Therefore, the evidence at this trial will show at most that Mrs. Marter was killed instantaneously by a single gunshot wound in the head.

3. As a matter of law, a crime resulting in instantaneous death by a single gunshot wound in the head is not a conscienceless or pitiless crime that is unnecessarily torturous to the victim.

4. *Fifth Amendment.* At the previous trial, the jury did not find that the capital offense was especially heinous, atrocious, or cruel. Under the double jeopardy clause of the Fifth Amendment, the state has had one fair opportunity to offer whatever proof it could assemble, and it is not entitled to another.

5. *Fourteenth Amendment.* The due process clause of the Fourteenth Amendment applies the Fifth and Eighth Amendments, as described above, to the states. In addition, the due process clause requires reversal of a jury verdict in a criminal case if no rational trier of fact could find the asserted fact beyond a reasonable doubt. No rational trier of fact could find beyond a reasonable doubt that defendant's capital offense was a conscienceless or pitiless crime that was unnecessarily torturous to the victim. It would thus be prejudicial, unconstitutional, and reversible error to submit this aggravating circumstance to the jury.

[63] Therefore, defendant respectfully requests that the Court enter an order preventing the state from relying on Miss. Code Ann. § 99-19-101(5)(h).

Respectfully submitted,

/s/ Earl B. Stegall
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Gulfport, Mississippi 39501

/s/ Joseph P. Hudson
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CERTIFICATE

I, Joseph P. Hudson, attorney for Defendant, do hereby certify that I have this day hand delivered a true and correct copy of the above and foregoing Motion To Preclude Consideration Of Miss. Code Ann. § 99-19-101(5)(h) to the Honorable Albert Necaise, District Attorney, Harrison County Courthouse, Gulfport, MS 39501.

This the 13th day of April, 1983.

/s/ Joseph P. Hudson
JOSEPH P. HUDSON

[Filed Apr. 13, 1983]

IN THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

No. 18,807

STATE OF MISSISSIPPI

versus

RICHARD GERALD JORDAN

Before THE HONORABLE DARWIN M. MAPLES, Circuit Court Judge of Jackson County, Mississippi (this case was transferred from Jackson County for trial on sentencing phase).

* * * *

THURSDAY
APRIL 28, 1983

* * * *

[856] MR. LUCIUS BROWN was thereupon called to the stand as a witness by counsel for the Defendant and, having been first duly sworn, testified as follows in the presence of the Jury:

DIRECT EXAMINATION

BY MR. HUDSON:

Q Would you state your name?
A Officer Lucius Brown.
Q Officer Brown, what is your address?
A Route 1, Box 278, Tutwiler, Mississippi.
Q Where are you employed, Officer Brown?
A Mississippi Department of Corrections.
Q Where specifically do you work for the Mississippi Department of Corrections?

A Maximum Security Unit. That's Unit 17.

Q What is your age, please?

A Thirty-eight (38).

Q Do you know the defendant, Richard Gerald Jordan?

A I do.

Q For what period of time have you worked for the Mississippi Department of Corrections?

A It will be four years on May the 10th.

Q How long have you been at the maximum security unit?

A For the time that I was employed. Since May the 10th of '79.

Q Was it on that date that you met this Defendant?

A Yes, it was.

Q What were the circumstances of your first [857] meeting Gerald Jordan?

A The circumstances of my first meeting Gerald Jordan was that Gerald Jordan—I came in contact with Gerald Jordan when it was time to put them on the exercise yard, which is something we do every day. We put them on the yard for a certain length of time. That's when I first met Gerald Jordan.

Q What are your job duties there at the maximum security unit?

A My job duty there is to work on—well we are assigned to a certain tier. I am assigned to C tier, which is death row. And my main job there is to make sure that each inmate gets their meal, their medication, their exercise that they should get, their writing material; whatever is necessary that they need, I make sure that they get it.

Q And you are the officer in charge on C tier?

A Yes, I am.

Q How often do you come into contact with Gerald Jordan?

A Every day, five days a week, except Wednesday and Thursday. But the other days, I come in contact with him.

Q What contact have you had with him as it relates to the operation of C tier?

A Well, when I became the officer in charge of C tier, a week later I went to Unit Administrator and discussed with him that I would like to have Gerald Jordan for my hall man. At that time we discussed it, and we chose Gerald Jordan to be a hall man. And the hall man's job is to make sure that each inmate gets his food when we put it on the tier; make sure that each inmate gets his pencil sharpened when he is supposed to; make sure that they get [858] hot water for his coffee; make sure that he keeps his tier clean. That's his job there where I'm working; the tier and windows in the cells.

Q Okay. And why was it you chose Gerald Jordan for that position of hall man?

A Because he showed me he was interested and he wanted to keep the tier clean. And I felt that he was the man to be chose to do this job because he was interested in doing it. He had personal hygiene about himself. And I felt that he would be the right man for it.

Q Over what period of time did Gerald Jordan perform this job as hall man?

A Up until approximately the time he was moved down here by Court Order.

Q How did he perform that job?

A He responded with a positive attitude. I had no problems. Whenever you told him to do anything, he did it. He didn't refuse. He even volunteered to do some work on his own, which was washing the walls and everything. I had no problem out of him whatsoever. He got along with the inmates well. When he got a package in, he shared it with each inmate.

Q What type of package are we talking about?

A These are packages that their people send them. They can get one once a month. Like food, candy, cookies, potatoe chips, and stuff of that nature. And he shared

it with each inmate when he got one in, and vice versa with the other inmates.

Q Officer Brown, does the job of hall man require your placing a degree of trust in the person selected? [859] BY MR. OWEN: May it please the Court, we object to this. First of all, this is three years after the crime.

BY THE COURT: I sustain it.

BY MR. HUDSON: Your Honor, I think that it is certainly a relevant matter to the defendant's character; how he has been, the process of rehabilitation.

BY THE COURT: Sustained.

BY MR. OWEN: That is not an issue, Judge.

BY THE COURT: I sustained it.

BY MR. HUDSON:

Q Has Gerald Jordan ever demonstrated any violent tendencies?

A Not to my knowledge.

BY MR. OWEN: May it please the Court, we object to that. How could he in maximum security.

BY THE COURT: Sustained.

BY MR. HUDSON:

Q Have you had occasion to observe the attitude of this defendant?

A Yes, I have.

Q How would you characterize that attitude?

A Peaceful, well mannered person—

BY MR. NECAISE: We object to that as not being a proper question, if the Court please.

BY THE COURT: Sustained.

[860]
BY MR. HUDSON:

Q Do you know the reputation of the Defendant for peace and violence?

BY MR. NECAISE: We object to that, if the Court please.

BY THE COURT: Sustained. Now, you are talking about in maximum security?

BY MR. HUDSON: Yes, sir.

BY MR. OWEN: They are all peaceful—

BY MR. STEGALL: —Judge, we are going to object to that. That's certainly not the case.

BY THE COURT: I have sustained the objection. Let's move on.

BY MR. HUDSON:

Q Do you know, Officer Brown, whether or not this is a defendant that can be rehabilitated?

BY MR. NECAISE: We object to that, if the Court please.

BY THE COURT: Sustained.

BY MR. HUDSON:

Q Is it true, Officer Brown, that other inmates in M.S.U. frequently have fights on the yard?

A Yes.

Q Has Gerald Jordan ever been involved in any of them?

BY MR. NECAISE: Objection.

BY THE COURT: Sustained.

[861] BY MR. HUDSON: We tender the witness.

CROSS EXAMINATION

BY MR. NECAISE:

Q Mr. Brown, you have been head of Tier C, which is on M.S.U., which is death row.

BY MR. STEGALL: Judge, I'm going to object to that, if it please the Court. May we approach the bench?

BY THE COURT: Sure.

(Whereupon a bench conference was held.)

BY MR. NECAISE:

Q On M.S.U. on the death row, each individual inmate convicted and sentenced to death has a separate cell?

A That's correct.

Q That's about what; an 8′ by 10′?

A That's correct.

Q They are all just lined up on one side, because you have a row of windows right here which are outside; and you have a cell here, here and right on down, just like a row of rooms or stalls, or whatever you want to call it?

A That's correct.

Q All right. Of course, you have got a row of bars here and then the wall out there; right?

A With the bars in front of each cell.

Q Then you have the bars on the cells right here?

A Correct.

Q And then you have got a sealed door back here that opens up to go in to or on death row?

[862] A Correct.

Q So when you talk about letting Gerald Jordan be the hall boy, he just walks from cell one to cell twenty-eight, or whatever it is down there, a distance of about four feet wide?

A That's correct.

Q Any one of them can. You have what—about thirty-three (33) inmates up there?

A Thirty-five (35) now.

Q Now, they don't come out of that cell—that 8′ by 10′ cell unless—do they have a shower in there? I have forgot.

A Yes, they do.

Q The shower is in there. So they don't come out of there unless they come down the hallway, out this one door, and into about a 50 by 75 exercise yard with about a 12 foot chainlink fence, with barb wire on it and guards at the stations. And you don't put them all out there at one time, do you?

A No, we don't.

Q You have a routine where you take three or four at a time out there?

A No. Thirteen (13).

Q You take thirteen at a time. Do they go every other day?

A Every day.

Q Every day they get an hour of exercise?

A They get four hours.

Q Four hours a day now.

A They are required one hour, but we give them four hours.

Q Now, you have been there since '79?

[863] A That's correct.

Q Didn't you have some problems with death row inmates about wanting television—

BY MR. STEGALL: May it please the Court, I'm going to object—

BY MR. NECAISE: —I didn't finish my question.

BY MR. STEGALL: I'm sorry if you didn't finish your question.

BY MR. NECAISE:

Q Haven't you had some problems with death row inmates about the quality of the food, and taking their pens and paper away from them, and their writing material and so forth, and censoring their mail? Hadn't there been some problems with that?

BY MR. STEGALL: May it please the Court, I'm going to object to that. That has nothing whatsoever to do with this Defendant.

BY THE COURT: Overruled.

BY MR. NECAISE:

Q Haven't you had that, Mr. Brown?

A Yes. But not with Jordan.

Q Jordan was not involved in that?
A No, he wasn't; not to my knowledge.
Q Are you sure of that?
A Positive.
Q Are you sure he didn't have anything to do with it?
A To my knowledge.
Q To your knowledge?
A Right.
[864] Q Do you know everybody that was involved in it?
A Well, I know quite a few. I know the ones that was involved that got disciplined with R.V.R.'s, and I issued some of those R.V.R.'s.
Q Now, of course, any of them are willing to get out and do anything to get out and walk up and down the hall and get some exercise and give out some plates?
A No.
Q They don't want to do that?
A Some of them don't even want to get out.
Q Richard Gerald Jordan is one of the oldest ones in length of time up there, isn't he?
BY MR. STEGALL: May it please the Court, I'm going to object to that.
BY THE COURT: Overruled.

BY MR. NECAISE:

Q Isn't he? When you went there, he had been there the longest of most of them there; there wasn't but two or three ahead of him?
BY MR. STEGALL: I'm going to object to that. This witness couldn't possibly—he said he had been there since 1979 and the man had been there since that point and time.
BY THE COURT: Overruled. Go ahead.
BY THE WITNESS: According to the roster that we have there, no, he is not the longest one there.

BY MR. NECAISE:

Q I did not say the longest. A man from [865] Jackson County is the longest.

BY MR. STEGALL: At this time, I'm going to object to comments by counsel.

BY MR. NECAISE:

Q I'm just asking you, Jordan is among one of the oldest on death row in the length of time there; since 1976?

A I wouldn't know.

Q You wouldn't know?

A No. Because I wasn't there in '76.

Q Well, when you got there. How many were there in '79 when you got there?

A I believe there was thirteen (13) if I'm not mistaken.

Q Thirteen. And there are now thirty-three (33)?

A Thirty-five (35).

Q Thirty-five. Okay. Of course, there is not much trouble a death row inmate can give you with the type security you all have there?

A Well, you can get problems from them now. Sometimes we be short of manpower, and there is a time that they can give you problems when you are not expecting it.

Q Of course, you have got them all individually locked, and you have got the cell doors that work where you can open only one cell door at a time, don't you?

A When you get ready to put them on the yard, that's a chance that they can give you a problem. Because when you put them on the yard, you open the cell door and they are going out there—all thirteen (13) of them, or whatever amount wants to go. That's when they could give you problems if they wanted to.

[866] Q The problem they could give you is if they wanted to fight one another; they can't get to you, can they?

A Oh, yes, because when we let them on the yard, counsel, we have to be on the tier with them to keep them from fighting among themselves in case they wanted to do this. So when we let an inmate out of his cell, there is an officer right there to escort him out to wherever he is going.

Q But you are not armed when you go out on the tiers?

A No.

Q So, ya'll are not worried about them giving you that much trouble because you are not even armed?

A That's correct.

BY MR. NECAISE: That's all we have.

RE-DIRECT EXAMINATION

BY MR. HUDSON:

Q Officer Brown, the District Attorney has asked you extensively about the conduct of this Defendant. You indicated there had been trouble up at M.S.U. from time to time.

A Yes.

Q Has Richard Jordan ever participated in any of the trouble or problems?

A No.

Q He has been a good inmate?

A Yes.

Q Would you characterize his behavior as excellent?

BY MR. NECAISE: Object to that as being leading.

[867] BY THE COURT: Was it?

BY THE WITNESS: Well, I wouldn't classify him as being excellent, but I would say that he is a man that I feel wants to rehabilitate himself.

BY MR. NECAISE: We object to that, if the Court please. It is unresponsive to the question.

BY THE COURT: Sustained.

BY MR. NECAISE: I would ask the Court to instruct the Jury to disregard that. It is an unresponsive answer.

BY THE COURT: The Jury will disregard it.

BY MR. HUDSON:

Q Now, Officer Brown, has Richard Jordan ever performed services for the officers and other inmates that he was not required to do?

A No.

Q Does he cut hair?

BY MR. NECAISE: Object to the leading, if the Court please.

BY THE COURT: Don't lead him.

BY MR. HUDSON: No further questions.

RE-CROSS EXAMINATION

BY MR. NECIASE:

Q Richard Gerald Jordan is one of your more intelligent people up there, isn't he?

A I wouldn't say that.

Q Would you put him in the lower ten percent of the people up there?

[868] A No, I wouldn't.

BY MR. HUDSON: Your Honor, we object to that question. We don't know what the lower ten percent is.

BY MR. NECAISE:

Q How would you classify him in comparing him with the other 35 death row inmates as far as intelligence?

BY MR. HUDSON: Your Honor, the witness has already addressed the question as to what he thinks about this question.

BY MR. NECAISE: He talked about his reputation. I want to know about his intelligence.

BY MR. HUDSON: Judge, he has already answered that question.

BY THE COURT: Overruled. How would you classify him?

BY THE WITNESS: As a respectable inmate.

BY THE COURT: I mean intelligence wise. Is he among the more intellectual ones there?

BY THE WITNESS: Well, Your Honor, yes, he would be.

BY MR. NECAISE:

Q So the more intelligent they are, the more opportunity they have to con somebody, don't they?

BY MR. HUDSON: Your Honor, I'm going to object to that.

BY THE COURT: Sustained.

[869] BY MR. HUDSON: I would ask that the Jury be instructed to disregard it.

BY THE COURT: All right; is that all, Mr. Necaise?

BY MR. NECAISE: Did we get an answer?

BY THE COURT: I sustained it.

BY MR. HUDSON: Nothing further of this witness.

BY THE COURT: Is that all?

BY MR. NECAISE: Judge, what is this man's badge number? Does he have a badge number?

BY MR. HUDSON: I'm going to object to that. This man is here pursuant to a subpoena.

BY MR. NECAISE: Well, we are entitled to get his badge number.

BY THE COURT: Do you have badges up there? A number?

BY THE WITNESS: Right; we do.

BY THE COURT: What is your number?

BY THE WITNESS: 1196.

BY THE COURT: All right, thank you. You may be excused.

(The Witness Was Excused.)

* * * *

IN THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

No. 18,807

STATE OF MISSISSIPPI

versus

RICHARD GERALD JORDAN

Before THE HONORABLE DARWIN M. MAPLES, Circuit Court Judge of Jackson County, Mississippi (this case was transferred from Jackson County for trial on sentencing phase).

* * * *

THURSDAY
APRIL 28, 1983

* * * *

[922] (Whereupon a bench conference was had, after which the Jury was sent out and the following proceedings were had in the absence of the Jury:)

BY THE COURT: Let the record show that Defense Counsel has offered the Honorable Rhett Russell as a witness. He had a conference here at the bench and I was informed a little about what he would testify to. And the State objected to it and I sustained it. But I have offered the Defense Attorneys an opportunity to make a record on his testimony.

BY MR. KILBRETH: Your Honor, if permitted to testify, Mr. Russell would testify about a method for generating electricity from an alternative energy source, as it is known; through wind tunnels and things of that nature. Mr. Jordan has been in contact with the Ten-

nessee Valley Authority over this invention and has entered into an agreement with them about it. And Mr. Russell is familiar with all those details and would testify about that.

BY THE COURT: This is some thoughts and ideas that have been developed by Mr. Jordan since he has been in prison; is that right?

BY MR. KILBRETH: That is correct, Your Honor.

BY THE COURT: Okay. Thank you. Are you ready [923] to proceed, gentlemen?

BY MR. HUDSON: Yes, sir.

* * * *

IN THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

No. 18,807

STATE OF MISSISSIPPI

versus

RICHARD GERALD JORDAN

[1184] SENTENCING INSTRUCTION NO. S-1

The defendant has been found guilty of the crime of Capital Murder; you must now decide whether the defendant will be sentenced to death or to life imprisonment. In reaching your decision, you may objectively consider the detailed circumstances of the offense for which the defendant was convicted, and the character and record of the defendant himself.

A.

To return the death penalty in this case you must first unanimously find from the evidence beyond a reasonable doubt that one or more of the following facts existed:

1. The defendant actually killed Edwina Marter;

2. That the defendant contemplated that lethal force would be employed.

B.

Next, to return the death penalty, you must find that the mitigating circumstances—those which tend to warrant the less severe penalty, life imprisonment—do not

outweigh the aggravating circumstances—those which tend to warrant the death penalty.

Consider only the following elements of aggravation in determining whether the death penalty should be imposed:

1. Whether or not the defendant Richard Gerald Jordan committed the Capital Murder while engaged in the commission of the crime of Kidnapping.

2. Whether or not the defendant Richard Gerald Jordan committed the Capital Murder in an especially heinous, atrocious or cruel manner.

[1185] 3. Whether or not the defendant Richard Gerald Jordan committed the Capital Murder for pecuniary gain.

4. Whether or not the Defendant Richard Gerald Jordan committed the Capital Murder for the purpose of avoiding arrest.

You must unanimously find, beyond a reasonable doubt, that one or more of the preceding aggravating circumstances exists in this case to return the death penalty. If none of these aggravating circumstances are found to exist, the death penalty may not be imposed, and you shall write the following verdict on a sheet of paper:

> "We, the jury, find the defendant should be sentenced to life imprisonment."

If one or more of these aggravating circumstances is found to exist, then you must consider whether there are mitigating circumstances which outweigh the aggravating circumstances. Consider the following elements of mitigation in determining whether the death penalty should be imposed:

1. The defendant has no significant history of prior criminal activity.

2. The age of the defendant at the time of the crime.

3. Any other matter, any other aspect of the defendant's character or record, and any other circumstance of the offense brought you during the trial of this cause which you, the jury, deem to be mitigating on behalf of the defendant.

If you find from the evidence that one or more of the preceding elements of mitigation exists, then you must consider whether it (or they) outweigh(s) or overcome(s) the aggravating circumstance(s) you previously found. In the event that you find that the mitigating circumstances do not outweigh or overcome the aggravating circumstances you may impose the death sentence. Should you find that the mitigating circumstances outweigh or overcome the aggravating circumstances, you shall not impose the death sentence.

[1186] C.

The verdict you return must be written on a separate sheet of paper by the foreman. Your verdict should be written in one of the following forms:

(1) "We, the jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder: [List or itemize all facts found, if any, from the list under section A of this instruction which you unanimously agree exist in this case beyond a reasonable doubt]

_____

_____

_____

Next, We, the jury, unanimously find that the aggravated circumstance(s) of: [List or itemize all of the aggravating circumstance(s) presented in section B of this instruction which you unanimously agree exist in this case beyond a reasonable doubt]

_____

_____

_____

is/are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstance(s), and we unanimously find that the defendant should suffer death.

_____

Foreman of the Jury"

(2) "We, the jury, find that the defendant should be sentenced to life imprisonment."

(3) "We, the jury, are unable to agree unanimously on punishment."

[Filed April 29, 1983]

IN THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

No. 18,807

STATE OF MISSISSIPPI,
Plaintiff

versus

RICHARD GERALD JORDAN,
Defendant

[1218] INSTRUCTION D-32

The Court instructs the jury that you may not find that the capital offense was especially heinous, atrocious, or cruel if you find from the evidence that the victim died a quick death without unnecessary pain and torture.

[Filed April 29, 1983]

IN THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

No. 18,807

STATE OF MISSISSIPPI

versus

RICHARD GERALD JORDAN

[1219] INSTRUCTION D-33

The Court instructs the jury that you may not find that the capital offense was especially heinous, atrocious, or cruel unless you find beyond a reasonable doubt that the actual murder of Edwina Marter was accompanied by acts of torture to Edwina Marter.

[Filed April 29, 1983]

IN THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

No. 18,807

STATE OF MISSISSIPPI

versus

RICHARD GERALD JORDAN

[1221] INSTRUCTION D-35

The Court instructs the jury that you may not find that the capital offense was especially heinous, atrocious, or cruel unless you find beyond a reasonable doubt that the actual commission of the capital murder of Edwina Marter was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime that is unnecessarily torturous to the victim.

[Filed April 29, 1983]

IN THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

No. 18,807

STATE OF MISSISSIPPI

versus

RICHARD GERALD JORDAN

Before THE HONORABLE DARWIN M. MAPLES, Circuit Court Judge of Jackson County, Mississippi (this case was transferred from Jackson County for trial on sentencing phase).

* * * *

FRIDAY
APRIL 29, 1983

* * * *

[1078] (Whereupon in the absence of the Jury, the following proceedings were had:)

* * * *

BY THE COURT: Okay, would you be looking at this. This is the usual one. We will go with S-1 here. State's Instruction S-1; what do you say for the Defendant?

BY MR. KILBRETH: We would object to S-1, Your Honor.

BY THE COURT: Okay. State your objections.

BY MR. KILBRETH: * * * [1079] Second, we don't believe that any evidence in this case demonstrates the kind of torture to the victim as required for instructions

with respect to heinous, atrocious and cruel. * * * Now, with respect to each of those, Your Honor, if you do decide that you are going to give those instructions for each of those aggravating circumstances, we have some alternative instructions which I will supply to the Court. I believe they have been supplied to the District Attorney. So, I suppose the thing to do, Your Honor, would be to rule on whether you are going to give those.

BY THE COURT: I am going to give these aggravating [1080] circumstances as listed in the State's instruction.

BY MR. KILBRETH: In that event, Your Honor, we would request that you give some additional instructions with respect to each of those; * * * D-32 requires the Jury to find that before they can find the murder was especially heinous, atrocious or cruel that there was torture as opposed to a quick death. D-33 is similar to D-32. I won't repeat it. * * * D-35 is similar to 32 and 33. * * *

[1081] BY THE COURT: All right. Defendant's Instructions 27 through 36 inclusive will be refused.

* * * *

[1086] BY THE COURT: * * * For the record, Instructions D-1 through D-26 are refused.

* * * *

[1087] BY MR. KILBRETH: And I might add, Your Honor, that the basis of all of these proposed instructions and objections to S-1 have been urged here and have previously been reflected in other papers we have filed.

BY THE COURT: They have.

BY MR. KILBRETH: Which we adopt again.

* * * *

IN THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

No. 18,807

STATE OF MISSISSIPPI

versus

RICHARD GERALD JORDAN

Before THE HONORABLE DARWIN M. MAPLES, Circuit Court Judge of Jackson County, Mississippi (this case was transferred from Jackson County for trial on sentencing phase).

* * * *

FRIDAY
APRIL 29, 1983

* * * *

[1090] (Whereupon the closing arguments were made to the Jury as follows:)

BY THE COURT: What do you say for the State?

BY MR. OWEN: May it please the Court, counsel opposite, ladies and gentlemen of the Jury, as Your Honor has told you, we have the opportunity to make our summation or closing arguments. I will take approximately 30, 35 or maybe 40 minutes in which to argue this case to you. So I ask that you, as best you can, give me your attention during this period of time.

As Your Honor has already instructed you, Richard Gerald Jordan has been found guilty of capital murder by another Jury at another time. Through the entire

procedure that we employed here, at another time and another place we presented this case, and the Jury found him guilty. We were required to do so as we went through that process of convicting him of guilt. Now the time comes for the sentencing, and we see Mr. Jordan come up on the stand. Six years. He takes the stand and he says, I'm a changed man; I didn't mean to do what I did. You finally got me convicted; now you got me in the box; it's getting close to the penalty stage; I'm going to play on your sympathy, I'm going to play on your mercy, I'm going to play on [1091] your bias. I'm a changed man. I didn't mean to do what I did. It was an accident, and I'm sorry because I have found the Lord.

BY MR. STEGALL: I'm going to object, Judge. And I will state my reasons at a later time.

BY THE COURT: All right. Overruled.

BY MR. OWEN: That, ladies and gentlemen, is what has occurred in this case since February and January of 1976. You heard his testimony. Very somber; very con-concerned; very deliberate testimony given to you. You also heard the tape recording of the night of January 12 and the morning of January 13, 1976, when he haunted, harassed and ran that man right there around Harrison County, Mississippi, wondering if his wife was still alive. I ask each one of you is that the same voice, same man who came up before you yesterday and told you he was sorry. You heard that tape. A cold, calculated—not a confused, not a misguided or misled young man. You heard that tape. Ladies and gentlemen of the Jury, you are going to hear the argument from both sides. You are going to hear the statement of counsel opposite about the duty and responsibility of the District Attorney's Office to prosecute and see that the death penalty is imposed. But I tell you as I stand here, I am not a member of the District Attorney's Office. I'm a Special Prosecutor; I haven't been assigned to nor affiliated with the District Attorney's Office in seven (7) years. I am not a propo-

nent of the death penalty in every case. I have never advocated that, and I [1092] don't advocate that to you today. But what I tell you is that there are cases that exist that warrant the imposition of the death penalty. And I have never in my eleven (11) years of practive ever seen a case so atrocious, so cruel and inhumane, that justifies the death penalty as this particular case does. Now, what you have got to do in this case—and sometimes it is very hard to do that—you have got to separate your mind from your heart. You have got to employ and you have got to use common sense. Because sometimes we become moved by our fellow man when he makes retribution; when he repents. You say, well, maybe this is really sincere. And we tend to forget about, and we put aside what happened January the 12th and January the 13th. We tend to forget about what was going through Edwina Marter's mind because she is not here to tell you about it. We forget about what was going through Chuck Marter's mind. All of this atrocious effect of this crime, we tend to forget about. I wish I could bring Edwina Marter here to sit up here and take the same stand that Richard Gerald Jordan did because I know you would have a different viewpoint after you heard her testimony. But I can't do that. What I'm asking you to do is to go back to that time, January of '76, and consider the evidence. Look at how this case went down. This plan started—and there is no question about it; he admits it. He comes up here and takes the stand and says, all right, I admit it. What else is he going to do? Find a way out. —I can say it is accidental. As illogical, unreasonable, [1093] forensically unsound as it may be, I can still say I have got a way out; it was an accident. This plan started in Louisiana. He tells you he was going to work offshore, and he is going to bring a sportscoat with him to go out on the rigs. I don't know about you ladies of the Jury, but you men can use your common sense; you know about that. You don't take a sportscoat and a tie to go to work on the rigs offshore. Then you are going to go to a pawn shop and you are going to trade in a shotgun for

a .38, when you have got two at home, just so you can have that extra gun. He planned this case from the minute he walked into that pawn shop until the time he got to Gulfport. He was formulating his plan. He knew exactly what he was going to do. He got his map, he got his General Electric folder, he had his gun, he had his cartridges. He went to a very remote area of Harrison County where he was going to take Mrs. Marter, or whoever the victim was going to be. He found Chuck Marter. And what is so terrifying about this case—it just happened to be Chuck, because that was the name given to him. You talking about random murder—I mean that's like putting a bunch of names in a hat, and picking out a name, and saying this is my victim. Sunday, January the 11th, Chuck and Edwina had no idea what was in store for them Monday. Just sitting there; just waiting to be struck. And this thing formulated for two days. And that's what makes it atrocious, ladies and gentlemen of the Jury. This is not a situation where you have a person coming in and who robs a bank on the spur of the moment; [1094] pulls out a gun and fires point blank and kills someone. That would be an impulsive reaction. This is a cold, calculated and designed plan that formulated in the mind of a very intelligent, a very smart individual. Smart enough to know how to bring down a plan; how to effect a kidnapping. He talks about a situation where there was low exposure; minimal exposure, minimal risk. True; it was minimal risk—for him. You see, in a kidnapping you have got one witness. In an armed robbery, you might have five, ten, fifteen to a hundred people. But in a kidnapping, a well planned and well thought out and well designed plan, ladies and gentlemen, you have got one witness there. That was Edwina Marter. His concern for that child, I will submit to you, does not relate to his great humanitarian desire to protect that child. I will give him this benefit. I don't believe he could have killed that child. And that's why little Kevin stayed at home. Because he would have been faced with the problem

of either having to kill Kevin and then Edwina, or kill Edwina and let Kevin see his mother die. He left the child at home. When Edwina walked out of that house, she knew that was it. That's why she didn't insist that the child go with her. Because she knew that within a short period of time she would probably die. And when he took her out of that house—let me tell you something —he was going to kill her. There was no doubt in his mind what he was going to do. This talk about the concern for the weather, about wearing a coat so she wouldn't get cold—oh, yes, she put a coat on. I submit to [1095] you that coat was part of the device to be used to tie her up; to bring it down behind her back. Because, see, you don't give somebody a coat and let them go out in house slippers for a stay in the woods. That's where his little theory sorta comes apart. Because that's what she had on; house slippers. This was all just so well planned. Ladies and gentlemen, I have been living in Harrison County all of my life. And you know how difficult it is to find these roads out here north of the county. Can you imagine somebody coming into Harrison County for a day and a half, who can find Turan Road and map it out for somebody just like that. In his confession—in his statement—he talked about Canal Road, Old Highway 49, Pass Road. He talked about going north on 49, going down this other road, going over a creek. Now, is that somebody who just happens to find the area? He studied that area. That was part of his plan. He knew exactly what he was going to do. He was going to take Mrs. Marter. When he got her in the car, he knew what he was going to do; no question, he was going to kill her. He had to. He had no choice; he could not leave a witness. This is where you have got to use your common sense; you have got to use it. When he took Edwina out to that remote area—a man who has spent all this time planning it. He had notebooks, manilla folders; he had a coat, he had a gun, he had cartridges, he had a map of the City of Biloxi, a map of the City of Gulfport. He

knew exactly what he was going to do. He changed his name; used a fictitious name. He [1096] got the name of Gulf National Bank out of the phone directory; matched it to the residential number of Chuck Marter. He had all of this so well planned. And then he forgot a rope? —Left his rope at home. —Going to use a tie; going to tie her up with a tie. There wasn't a rope; there was never any intentions of using a rope. He was going to kill her. If you believe, and if you want this case to go down in history as this Jury accepting a proposition that Richard Gerald Jordan, without any design or without any intent, just pulled this gun out and as it went off like that it accidentally struck Edwina Marter in the back of the head, and went out above her eye. If you want this case to go down in history like that, then you buy it. Do you believe that at 30 feet, or 10 yards, that he just pulled this gun out and fired it and accidentally struck her in the back of the head, and it came out at the top of her left eye? That's what your verdict will be if you give him life. See, ladies and gentlemen of the Jury, these pictures tell a lot. I will get to Dr. Sampson's testimony in a minute. These pictures tell a lot; the position of her head, the position of her hands. And if you will recall, when I had Dr. Sampson on the stand and I put Miss LeShieur down here on the floor on her knees and I asked him this question; I said, if Mrs. Marter was shot in this position, what would happen to her. He said her face would go straight to the ground and her hands out by her side. Exactly, exactly the way it happened in this case; with a kleenex by her hand. Use your common sense. If you were [1097] running through the woods and you are shot with a .38 projectile, are you going to land face down with your hands by your side? You are either going to roll, or stumble, or fall on your side or your back; you are not going to fall in an execution style position. And I don't care what Mr. Jordan says, there is no way that he accidentally pulled this gun and struck her in the back

of the head at a range of ten yards or thirty feet and that coincidentally she fell face down, stopped in her tracks with her hands beside her; no blood in front of her, with all the blood concentrated around her mid waist to right knee. That's where the common sense comes in. That, ladies and gentlemen, is what Dr. Sampson said. I didn't put him on the stand; they did. He told me, among other things, that that would be the position of her body if she were struck while on her knees. He also said on Direct Examination, "I cannot tell how far she would have been; maybe 4 feet, maybe 50 feet." Assuming she was four feet, that still supports our theory. You don't go running through the woods, and somebody pulls a gun out and fires a .38 projectile at you, and you land in that position. You have seen these pictures of this gun. You have got one fired cartridge, a live one, and a fired one. Now, they can put the blame on old Freddie Ladner. We know that one killed Edwina. We know that one wasn't fired. And we know Freddie fired that one. You can decide what happened out there. All I'm going to do is suggest to you. I tell you she was on her knees just like that picture indicates. He fired that [1098] shot. She hit the ground. He cocked it; he wanted to make sure that his victim was dead. He looked at her. He felt her pulse, realized that she was dead, released it. Freddie Ladner took it out of the water; he fired it. That's what I submit to you happened. That, ladies and gentlemen, is what makes this case atrocious. Another thing that is bothering me, and has bothered me since 1976—and I have never had to face this problem until Mr. Jordan took the stand. He makes it sound like we ought to apologize to him because Edwina took off running. Didn't she have the right to run? I mean, why was she out in the woods to begin with? She had the right to run. She was under no obligation to stand there and be murdered. Even if we accept this theory as true— He wants to tell you well, she ran and it was an accident; sorry. Like she shouldn't have run.

You have got to look at this case in terms of what occurred in January of '76; not today, ladies and gentlemen. It didn't happen today; it didn't happen yesterday. It happened in January of '76. He says greed. Yes, it was greed. "I wanted money." See, this is an open confession, strictly employed to draw your sympathy. And it is very effective; very effective. Ladies and gentlemen of the Jury, here is a man that I submit to you executed a woman and then made his first ransom demand—because he was confused. He wasn't confused on that tape that you heard when he talked to Chuck Marter. He made that first ransom demand long after Edwina Marter was dead. He made a second ransom demand, and he made a third ransom [1099] demand. And then he talks how he didn't want to injure anybody and he was concerned about her safety, and they were going down Old Highway 49 at 90 miles and hour and he knocks Larkin Smith off in the ditch. He could have killed two more people there. "Oh, I was concerned; I didn't know who it was. He pointed a gun at me." He knocks their car off in the ditch. Two more could have been killed. So what, you know; it was an accident. I was confused.

Ladies and gentlemen of the Jury, you cannot buy that kind of story. You cannot let this type of crime go on in Harrison County, Mississippi. It's as simple as that. Three more ransom demand calls after she was dead. And then to think that the night after she was killed, he casually goes into the Norwood Village Cinema and catches a show. I assume he ate some popcorn and had some coke, and watches a show like nothing had happened. Mr. Marter was at home, up all night, wondering about the whereabouts of his wife; the children wondering about their mother; law enforcement officers, Federal Bureau of Investigation, Harrison County Sheriff's Department, Gulfport Police Department, Bureau of Narcotics, all running up and down the highways trying to find this lady before it was too late. And Mr.

Jordan is sitting in the Norwood Village Cinema. Then the next day, to show how concerned he was about it, he gets him a Reader's Digest. And I assume he employed the crossword puzzle game and reads the Reader's Digest. Then he comes into this courtroom seven years later and says "if there [1100] was anything I could do to bring Edwina Marter back, I would bring her back." Sure he would. If she was here today, we wouldn't have a trial. This case was for pecuniary gain. There was only one way to affect it; that was to kill Edwina. And if he had made it past Mr. Tollison's roadblock, he could have got to the Twin Star Motel, stayed out for a couple of nights, gone back to Louisiana, and we would never have seen him. And do you think that if we hadn't captured him and he had gone back to Louisiana that he would have walked into the courtroom here, ladies and gentlemen, and said, "hey, I'm a changed man; I'm the one that killed Edwina Marter. I want ya'll to prosecute me." Do you believe that would have happened? Do you believe he would have done that; turned himself in? That he would have walked in and said, "here, I give myself up"; do you believe that? Ladies and gentlemen of the Jury, there is no need talking about all the evidence because it is now admitted. It was admitted yesterday. He said, I did everything you said I did; I killed her—accidentally. It was all for money. I did all these things; I used a fictitious name; I got Chuck's name out of the phone book; I found out where he lived. It looked like he had a nice house. He was a man with money, or access to money. I did all that. Everything is true until we get out in the woods. —And you know, I told her not to run. She ran and I was just going to fire a shot over her head to warn her, and low and behold I hit her in the back of the head. The projectile went through [1101] the brain, went through the cranial cavity, fractured the entire cranial cavity and exited with such power and velocity that we never found the lead shell. You know—I'm sorry.

But, you know, the most revealing testimony to me was Reverend Padgett's. That's the minister up at the Penitentiary. When I asked him the question on Cross Examination, "Reverend, a lot of these inmates find the Lord when they are up there, don't they?" "Yes." They subscribe to your ministry; they become involved in your ministry, and they find the Lord. "And when they get out, they do the same thing again." "Yes. A lot of them don't but some of them do." Do you remember when I asked him that question? They all tend to find the Lord. And that's good. But when you find the Lord for a defense, then that's when you separate it from the true ministry. I don't think you ought to have to kill somebody to find the Lord. But when you come in the courtroom and you say, "I have found the Lord and that's why you ought to give me life imprisonment", then that is wrong. See, ladies and gentlemen, what makes this case so difficult is that we have got a lady who has been dead for seven years, as the evidence shows; brutally and atrociously murdered. And you have got to consider that; the way she was murdered; the way she was taken from her house. I mean, there is nothing Edwina Marter, or Chuck, or anybody else could have done; there is no way to have defended this, unless she had said, no, I'm not going to let you in the house; I don't believe you are a General Electric [1102] Representative. But you didn't know Edwina Marter, so you couldn't appreciate the kind of person she was. She trusted him. See, he wouldn't have gone there if Chuck was there. He wouldn't have pulled the stunt when Chuck was there because Chuck would have defended himself and defended his wife. But to wait until Chuck leaves, and then he walks in that house and says, I'm a General Electric Representative; I want to check your defective circuit breakers. Zero, lady; come with me, I've got you. What was going through her mind? With that little baby in the back bedroom, what was going through her mind? And then seven years later we come

into the penalty stage right when we get down to many many years of effective prosecution. Many many years we have worked on this case waiting for this very minute, and I'll de dadgum it, if he doesn't take the witness stand and say "I'm sorry"; "I'm sorry that I did it, and I think I ought to have life imprisonment." See, because when I was a little boy I wasn't a bad fellow. Well, I'm sure that's true. But he has committed a most serious, atrocious and heinous crime known to mankind. He did it for pecuniary gain, he did it in the commission of a kidnapping, and he did it to avoid arrest. Any one of those aggravating circumstances you could use. They are all applicable. And now he says, I don't deserve the death penalty because I'm not that kind of guy any more; I deserve a second chance, so to speak.

You know, so often, ladies and gentlemen, when you look at a case like this where the facts are so [1103] overwhelming, and the nature of the case is so tragic, you tend to say to yourself, well, what about the rights of the victim. You have seen this ordeal we have gone through for three days. It was the same thing when we tried it; seven, eight or nine days of trial. He is represented by counsel over there; he's got one on one side, and one on the other; one sitting here, and one back there. A doctor came in and testified for him. He got all of the Constitutional Rights afforded him; all these rights he got. And what did Edwina Marter get? A .38 projectile in the back of the head; two children without a mother; a husband without a wife; a bank in an uproar; and the entire county distraught over what has happened to our society. Let me tell you something, ladies and gentlemen. You have an awesome responsibility. But when you took your seat and you said if the facts warranted it you would impose a death penalty, we accepted what you said as true. And we assumed that if you told us if the facts warranted it, you would impose a death penalty, that you would do it without hesitation. What other facts could exist in this case to

warrant the death penalty? When you plan to kill someone, when you plan to kidnap them; what else could you have done to make this case more atrocious? I had considered going over some of the evidence with you, but I don't think that would serve any useful purpose because it has all been admitted, except for what happened out there. And to think that we have got to spend days here arguing about whether or not she was running or standing [1104] still, when he had no businss taking her out there in the first place. But that's the way our legal system is. He is afforded that right. He has a right to counsel; he has the right to make us prove she was on her knees, or standing still, and—"if I can maybe slip in some legal technicality, if I can employ some type of legal gymnastics, see, and I can get the Jury to believe that she was running and it was an accident, boy, I'm free; iow, I have won it under the texture and the auspices of the Constitution." What about Edwina? "Well, she is dead and we can't bring her back; let's take care of Richard Gerald Jordan. Let's take care of him." I feel strongly about this case. And I'm not going to sit here as an officer of the Court and lie to you about the facts in this case. They speak the truth. You can disregard what I say. But I tell you, each and every one of you, that you have a duty and a job consistent with the oath that you took when it was administered to you—to impose the death penalty when the facts and circumstances are warranted. And they are warranted here. Justice demands it. Edwina Marter demands it, and those two kids demand it. You talking about society; Kevin is now ten (10). He was three (3) when his mother died. The oldest son is seventeen (17). They are the ones who are going to look back and see what justice is. My momma was shot down in the woods with a .38, and her murderer got life imprisonment. —Cause momma was taken from the house, see.

BY MR. STEGALL: We are going to object to that [1105] sort of argument.

BY THE COURT. Overruled.

BY MR. OWEN: Dr. Sampson's testimony was, in my opinion, the most cogent and the most effective testimony for the State of Mississippi in the pursuit of our contention that the death penalty ought to be imposed. When he told me exactly what condition Edwina Marter's body would have ended up in if she had been on her knees when the shot was fired, and he said, face down; hands to her side. It is even more convincing that I was right in what I'm telling you here. And when he told me it was highly improbable that Richard Gerald Jordan could have pulled this gun from his waistband, shot indiscriminately and arbitrarily at a distance of 30 feet and just coincidentally struck her in the back of the head—he said, that's improbable. See what you are faced with here, and where we have somewhat of a disadvantage. You had the opportunity to hear Mr. Jordan make his plea. As I told you, I can't bring Edwina back. I can only make her plea for her. You cannot be guided by this 11th hour sympathy and bias, or prejudice or whatever you want to call it, that is taking place on this witness stand seven (7) years later. It is the facts as they existed on January the 12th. And, I will tell you this: You can accept it, you can disregard it, or do what you want with it. He is an intelligent man; Richard Gerald Jordan is. And I don't believe what he had to say about what occurred on that cold day out there in terms of an [1106] accident, nor do I believe that he is so sorry for what he did. He became sorry when the death penalty was facing him. Do you think he could have took the stand and said, "I'm not sorry; I'm glad I did it; that was part of my plan." What would ya'll have done? He is a smart man. If he had given you that kind of testimony; if he had said, I'm not sorry, I meant to do it, he would have lost you just like that. So, he employed what he knew; religion. He brought in Reverend Powell. And Reverend Powell said, yes, Richard Jordan is a very intelligent, deliberate, logical, intense, very intelligent man. Sure he is. Then,

of course, the good Sister testified. I assume that she is a member of the Catholic religion. But so are Mr. Necaise and myself. And we don't happen to share the same belief that the Sister does. She doesn't believe in the death penalty. And that's fine. But, see, ya'll told me you did. And I expect you to help us bring to a conclusion this seven years that we have been in pursuit of this case to try to bring justice for what happened to this little lady.

They are going to get up here and tell you about capital punishment, and etcetera, and that Richard Gerald Jordan is a changed man. They are going to spend time talking about what I said. That's fine. But you just remember one thing: We are looking for justice and for what is right and what is wrong. And what was done to this lady in the manner that it was done demands, warrants, justifies imposition of the death penalty. Anything less [1107] than that is a victory for Richard Jordan. He stands up; he smiles at everybody; everything is fine. I implore you, ladies and gentlemen, to use your good common sense. Everyone of you are good, law abiding, Christian citizens. I know you are not going to be led down that path for some kind of confusion that we saw in this courtroom. Listen to their argument; listen to every word they have got to say. But I'm telling you, you have a duty and a responsibility—an awesome responsibility, but you have got to stand on it just like Judge Maples said in his instructions. Regardless of the consequences, you must follow the law; follow the evidence. Regardless of the consequences. And I ask you to do that.

Thank you.

(CLOSING ARGUMENT BY MR. STEGALL FOR DEFENDANT:)

BY MR. STEGALL: May it please the Court, Mr. Owen, Mr. Necaise, Miss LeShieur, ladies and gentlemen

of the Jury, it never fails when I come down to this point I am always scared. I always feel like I have a lot of weight on me, obviously, at this point.

BY THE COURT: Excuse me, just a minute, Mr. Stegall.

BY MR. STEGALL: Yes, sir. Do you want to take that break now?

BY THE COURT: We will take a five minute recess, ladies and gentlemen. You can go to your room for just a minute.

[1108] (In the absence of the Jury, the following motion was made:)

BY MR. KILBRETH: Your Honor, we object to the earlier portions of Mr. Owen's argument on two grounds. One was, I believe, his reference to the fact that Mr. Jordan did not take the stand in the earlier trial, which is in clear violation. It is well settled authority that the prosecution cannot refer to the fact that the Defendant did not take the stand. That would be applicable here, as well. And, in addition, he made some—in our view—references to improper aggravating circumstances. I can enumerate all those if you would like me to list them, Your Honor.

BY THE COURT: Go ahead and list them.

BY MR. KILBRETH: I think it was several times he made reference to the fact that this was the 11th hour of his taking the stand; he didn't do it seven years ago. I think that's a big problem, Your Honor. It is a serious Constitutional violation, and we would move for a mistrial on that ground alone. In addition, I think there are some other references to what might be considered as aggravating that are clearly not proper. I won't list all of those. I think they are obvious. I move for a mistrial on that ground, as well.

BY THE COURT: Overruled.

* * * *

IN THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

No. 18,807

STATE OF MISSISSIPPI

versus

RICHARD GERALD JORDAN

Before THE HONORABLE DARWIN M. MAPLES, Circuit Court Judge of Jackson County, Mississippi (this case was transferred from Jackson County for trial on sentencing phase).

* * * *

FRIDAY
APRIL 29, 1983

* * * *

[1157] (Whereupon the Jury retired at approximately 2:20 o'clock p.m., and in the absence of the Jury the following proceedings were had:)

BY THE COURT: You wanted to make a motion?

BY MR. KILBRETH: Yes. First, we would move for [1158] a mistrial again on the basis of the District Attorney's final closing arguments.

BY THE COURT: Overruled.

IN THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

No. 18,807

STATE OF MISSISSIPPI,
Plaintiff,

v.

RICHARD GERALD JORDAN,
Defendant.

[1236] MOTION FOR NEW TRIAL

COMES NOW the defendant, Richard Gerald Jordan, by and through his attorneys, and moves this Court to grant a new trial pursuant to Rule 5.16 of the Mississippi Criminal Rules. This motion should be granted because, among other reasons, the interests of justice require it, the verdict is contrary to law and the weight of the evidence, the Court admitted illegal testimony and excluded competent and legal testimony, and the Court misdirected the jury in several material matters of law and failed to instruct the jury properly upon all questions of law necessary for their guidance. In particular, defendant asserts as grounds for his motion:

* * * *

[1237] VI.

That the Court erred in overruling defendant's motion to preclude consideration of Miss. Code Ann. § 99-19-101(5)(h).

* * * *

[1240] XXVII.

That the Court erred in allowing the prosecution to refer to defendant's previous death sentence.

XXVIII.

That the Court erred in excluding the testimony of Rhett Russell.

XXIX.

That the Court erred in excluding testimony about the circumstances of other capital murders in which life sentences rather than death were imposed.

XXX.

That the Court erred in denying each of defendant's thirty-six proposed instructions.

XXXI.

That the Court erred in granting State's Instruction S-1 without modification, in that:

* * * *

[1241] 4. Instruction S-1 improperly included three aggravating circumstances not supported by the evidence.

* * * *

XXXIII.

That the Court erred in overruling defendant's motion for a mistrial based on the prosecution's comment in closing argument on defendant's exercise of his Fifth Amendment right not to testify at the conviction stage of his earlier trial.

XXXIV.

That the Court erred in overruling defendant's motion for a mistrial based on the prosecution's reference to non-statutory aggravating circumstances in its closing argument.

[1242] Defendant reserves the right to cite additional reasons in support of this motion.

Respectfully submitted,

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[Filed May 13, 1983]

IN THE CIRCUIT COURT
OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

CAPITAL MURDER
Number 18,807

STATE OF MISSISSIPPI

versus

RICHARD GERALD JORDAN

ORDER OVERRULING MOTION FOR NEW TRIAL

This day this cause came on to be heard on Motion of the Defendant Motion For New Trial, and the Court, having heard the said Motion and having considered the same, is of the opinion that the Motion is not well taken and should be overruled. It is therefore,

ORDERED AND ADJUDGED that the Motion For New Trial be and the same is hereby overruled.

ORDERED this the 13th day of May, 1983.

/s/ Darwin M. Maples
Circuit Court Judge

[Filed May 13, 1983]

IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

No. 55-493

RICHARD GERALD JORDAN,
Appellant,

v.

STATE OF MISSISSIPPI,
Appellee.

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Dated: June 14, 1984

* * * *

ARGUMENT

I. THE TRIAL COURT'S INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES WERE UNCONSTITUTIONALLY VAGUE AND PERMITTED THE JURY TO FIND AGGRAVATING CIRCUMSTANCES THAT WERE UNSUPPORTED BY THE RECORD AND THAT IMPERMISSIBLY OVERLAPPED WITH EACH OTHER AS WELL AS WITH THE STATUTORY ELEMENTS OF CAPITAL MURDER.

Despite objections by defense counsel, the trial court instructed the jury that it could consider as aggravating circumstances whether Mr. Jordan committed the capital murder (1) "in an especially heinous, atrocious or cruel manner," (2) "for pecuniary gain," and (3) "while engaged in the commission of the crime of kidnapping."[2] As demonstrated below, none of these instructions was proper.

1. *Especially heinous, atrocious and cruel.*

In *Godfrey v. Georgia*, 446 U.S. 420 (1980), the United States Supreme Court reversed a capital sentence which had been imposed based upon a similar statutory aggravating circumstance—an "outrageously or wantonly vile, horrible and inhuman" murder. The Supreme Court held that, in the absence of a limiting instruction, the vague statutory language failed to channel jury discretion properly:

> "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or

[2] The court also instructed the jury on the aggravating circumstance whether the murder was committed in order to avoid arrest. The jury, however, did not find this circumstance.

> wantonly vile, horrible and inhuman.' . . . [T]he trial judge's sentencing instructions . . . gave the jury no guidance concerning the meaning of any of [the aggravating circumstance's] terms. In fact, the jury's interpretation of [the aggravating circumstance] can only be the subject of sheer speculation." *Id.* at 428-29.

The same is true in this case. Any murder could be deemed "especially heinous, atrocious or cruel." This Court has therefore held that this factor must be limited to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim," *Coleman v. State*, 378 So. 2d 640, 648 (Miss. 1979) (citation omitted), and the United States Court of Appeals for the Fifth Circuit has upheld the constitutionality of this aggravating factor only because of this limiting construction. *Gray v. Lucas*, 677 F.2d 1086, 1105 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1886 (1983).[3] Yet the trial court refused to give a limiting instruction proposed by the defendant that would have stated verbatim the *Coleman* definition for this factor.[4] Indeed, it provided the jury no guidance whatsoever on how to interpret the open-ended statutory language. Even if one assumes that it was proper to

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[3] Where no effort has been made to narrow the potentially boundless meaning of this aggravating circumstance, it has been held unconstitutionally vague. *See Proffit v. Wainwright*, 685 F.2d 1227, 1263-66 (11th Cir. 1982), *cert. denied*, 104 S. Ct. 508 (1983); *People v. Superior Court*, 31 Crim. L. Rep. (BNA) 2325 (Cal. Sup. Ct. July 1, 1982); *State v. Sonnier*, 402 So. 2d 650 (La. 1981), *cert. denied*, 103 S. Ct. 3571 (1983).

[4] (Defense Instruction D-35; [A. Appendix A]). The defense also proposed two other limiting instructions which were refused: that the jury could not find the murder especially heinous, atrocious or cruel (1) if it found that "the victim died a quick death without unnecessary pain and torture" or (2) unless it found that the murder "was accompanied by acts of torture." (Defense Instructions D-32, D-33; [A. Appendix A]).

submit this factor to the jury at all,[5] it was clear constitutional error to fail to give such guidance.

This Court, in a five-to-four decision, recently held that the failure to provide such a limiting instruction did not require reversal. *Edwards v. State*, 441 So. 2d 84 (Miss. 1983). *Edwards*, however, is distinguishable in two significant respects. First, in explaining why *Godfrey* was not controlling, the majority in *Edwards* stressed that, had the jury been given the limiting instruction, it would have found the murder "unnecessarily torturous."[6] The evidence was "undisputed" that Edwards "deliberately" shot his victim, who remained conscious long enough to fire back six rounds. Here, by contrast, there was substantial evidence that the murder was unintentional, and, as was true in *Godfrey*, the evidence was undisputed that the victim died immediately. In short, had the jury been properly instructed, it is highly unlikely that it would have found this aggravating circumstance.

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[5] The jury here should not have been instructed that it could consider this aggravating factor, *cf. Williams v. State*, 445 So. 2d 798, 814 (Miss. 1984), and this Court should hold that the finding is unsupported by the evidence. The Florida Supreme Court, whose limiting construction of this aggravating factor is identical to that adopted by this Court, has repeatedly held this factor inapplicable to murders, such as this one, in which the victim dies immediately. *See, e.g., Simmons v. State*, 419 So. 2d 316, 319 (Fla. 1982); *Odom v. State*, 403 So. 2d 936, 942 (Fla. 1981); *Williams v. State*, 386 So. 2d 538, 542-43 (Fla. 1980); *Riley v. State*, 366 So. 2d 19, 21 (Fla. 1979).

[6] There is some language in the opinion suggesting that as long as the jury *could* have found the murder "unnecessarily torturous," the failure to instruct the jury that it had to make this finding in order to find the aggravating circumstance does not require reversal. This suggestion, if intended, it is respectfully submitted, is in error. That the jury *could* have made the proper finding does not mean it *would* have. Only when constitutional error is harmless beyond a reasonable doubt may it be ignored. *Chapman v. California*, 386 U.S. 18, 24 (1967).

Second, the *Edwards* majority viewed the finding of this aggravating factor as harmless error, because the jury found other aggravating circumstances, which were supported by the record, and there were *no* mitigating factors. In the present case, however, there were substantial mitigating circumstances, both statutory and non-statutory.[7] The error cannot be deemed harmless since there is no way to know if the jury would still have found the mitigating circumstances "insufficient" to outweigh any remaining aggravating factors.[8]

* * * *

IV. DEFENSE COUNSEL WAS IMPERMISSIBLY RESTRICTED IN THE PRESENTATION OF MITIGATING EVIDENCE.

Throughout the trial, defense counsel was precluded from presenting mitigating evidence. The trial court sustained numerous objections by the prosecution to the testimony of several character witnesses offered in mitigation. Indeed, one witness was precluded, without explanation by the court, from testifying at all. As set forth in the proffer, that witness, Rhett Russell, would have testified about an invention—in which the Tennessee Valley Authority had expressed interest—that Mr. Jordan made while in prison for generating electricity from alternative energy sources such as wind tunnels. (A. 29; Tr. 922).

Similarly, the testimony of numerous witnesses was substantially truncated. Lucius Brown, a guard at the

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[7] For example, Mr. Jordan had no prior criminal record and had been a loving husband and father. Moreover, as demonstrated below, the finding of the other two aggravating circumstances cannot be upheld.

[8] *See, e.g., Elledge v. State*, 346 So. 2d 998, 1003 (Fla. 1977).

The United States Supreme Court upheld Florida's harmless error rule last term, emphasizing that it applies only when there are no mitigating circumstances. *Barclay v. Florida*, 103 S. Ct. 3418, 3426 (1983).

prison where Mr. Jordan is incarcerated, was completely hampered from testifying about Mr. Jordan's cooperative attitude as an inmate. The prosecution voiced repeated objections, which the court uniformly sustained. (A. 24-26; Tr. 858-60). The effect was as if Mr. Brown was precluded from taking the stand altogether, as happened with Mr. Russell. Again, the court gave no reason for excluding this mitigating evidence despite defense counsel's plea that "it is certainly a relevant matter to the defendant's character; how he has been, the process of rehabilitation." (A. 24; Tr. 859).

The testimony of Shirley Thames, Mr. Jordan's first cousin, was also substantially restricted. Mrs. Thames atempted to testify about Mr. Jordan's family life but the court—again without explanation—sustained objections to questions concerning Mr. Jordan's relationship with his wife. (A. 22-23; Tr. 847, 848-49). The trial judge also severely limited the testimony of Robert Jordan, the defendant's brother. The witness, for example, was not allowed to explain at all his testimony that the defendant had a good reputation for peacefulness. (A. 20-21; Tr. 833-34).

The United States Supreme Court has made it abundantly clear that restrictions on the presentation of mitigating evidence, such as those in this trial, are constitutionally impermissible in a capital case. Thus, in *Lockett v. Ohio*, 438 U.S. 586 (1978) the Supreme Court set aside a death sentence because the state had prevented the sentencer from considering mitigating evidence. The Court held:

> "[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor, any aspect of a defendant's character or record* and any of the circumstances of the offense that the defendant proffers as a basis for a

sentence less than death." *Id.* at 604 (citations omitted) (emphasis added in part).

The Court reaffirmed the *Lockett* rule in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), reversing a death sentence imposed in a trial in which the sentencer's consideration of mitigating evidence had been restricted. The Court explained in both *Eddings* and *Lockett* that a capital defendant's right to present whatever mitigating character evidence he proffers is an indispensable part of the constitutional requirement of individualized sentencing, "ensur[ing] the reliability, under Eighth Amendment standards, of the determination that death is the appropriate punishment in a specific case.'" *Lockett*, 438 U.S. at 601 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)).[28]

This Court has also recognized this principle. Thus, in *Jackson v. State*, 337 So. 2d 1242 (Miss. 1976), this Court stated that such a defendant may

> "adduce proof of any other circumstance or combination of circumstances surrounding his life and character or the commission of the offense with which he is charged that would be reasonably relevant to the question of whether he should suffer death or be sentenced to life in prison." *Id.* at 1256.

This Court acted on the *Jackson* principle in *Coleman v. State*, 387 So. 2d 640 (Miss. 1979), where it found that the defendant's right to introduce mitigating evidence had been improperly restricted because the judge had

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[28] The Supreme Court has on a number of other occasions reversed death sentences based on restrictions on the presentation or consideration of mitigating evidence. *See Green v. Georgia*, 442 U.S. 95 (1979); *Bishop v. Arizona*, 439 U.S. 810 (1978); *Adams v. Ohio*, 439 U.S. 811 (1978); *Nabozny v. Ohio*, 439 U.S. 811 (1978); *Bell v. Ohio*, 438 U.S. 637 (1978). *Green*, like this case, involved judicial rulings excluding mitigating testimony.

instructed the jury to consider only one mitigating circumstance.[29]

These decisions are controlling here. There can be no doubt that the excluded mitigating evidence was relevant to whether Mr. Jordan should receive life or death. A defendant's treatment of his family, his willingness and ability to contribute significantly to society following his crime, his behavior in prison, and his history of peacefulness bear directly on a central aspect of any sentencing proceeding: whether the defendant can be rehabilitated and become a productive member of society.[30]

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[29] *See* also *Leatherwood v. State*, 435 So. 2d 645, 661 (Miss. 1982) ("Constitutionally, a state may not limit the circumstances or factors that may be considered in mitigation of punishment at the sentencing phase of a capital murder trial") (Robertson, J., dissenting); *Washington v. State*, 361 So. 2d 61, 68 (Miss. 1978) ("[i]t is crystal clear from our holding in *Jackson* that this Court is committed to the 'individualized consideration of mitigating factors' in each case, and that the only limitation placed on the introduction of evidence of mitigating circumstances is that it must be *reasonably relevant*") (emphasis in original), *cert. denied*, 441 U.S. 916 (1979).

[30] Thus, the Supreme Court's direction in *Lockett* that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense," 438 U.S. at 604 n.12, is inapposite here. *Cf. Williams v. State*, 445 So. 2d 798 (Miss. 1984) (court may exclude evidence concerning the character of *other* defendants convicted of capital murder); *Shriner v. Wainwright*, 715 F.2d 1452 (11th Cir. 1983) (state may constitutionally preclude defendant from presenting evidence concerning the horror of electrocution, because this evidence does not reflect on the particular defendant but rather on the propriety of the death penalty generally).

VIII. THE PROSECUTOR'S CLOSING ARGUMENT INCLUDED NUMEROUS REFERENCES TO THE DEFENDANT'S PRIOR EXERCISE OF HIS FIFTH AMENDMENT RIGHT NOT TO TESTIFY AS WELL AS OTHER HIGHLY IMPROPER AND PREJUDICIAL REMARKS:

During closing argument, the prosecution repeatedly referred to the fact that Mr. Jordan had elected not to take the stand in his prior trials. Indeed, the prosecutor made this one of the focal points of his summation, by stating in the first substantive paragraph of his initial closing argument:

> "Through the entire procedure that we employed here, at another time and another place we presented this case, and the Jury found him guilty. We were required to do so as we went through that process of convicting him of guilt. *Now the time comes for the sentencing, and we see Mr. Jordan come up on the stand.* Six years. He takes the stand and he says, I'm a changed man; I didn't mean to do what I did. You finally got me convicted; now you got me in the box; it's getting close to the penalty stage; I'm going to play on your sympathy, I'm going to play on your mercy, I'm going to play on your bias. I'm a changed man. I didn't mean to do what I did. It was an accident, and I'm sorry because I have found the Lord." (A. 36; Tr. 1090-91).

Defense counsel immediately objected and moved for a mistrial. The court overruled the objection, denied the motion, and failed to give any curative instruction, even though the prosecutor referred to the defendant's prior silence at two other points in his remarks.[54]

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[54] Thus, the prosecutor commented:

> "Another thing that is bothering me, and has bothered me since 1976—and *I have never had to face this problem until Mr. Jordan took the stand.* He makes it sound like we ought

Both the United States Supreme Court and this Court have made clear that such comments by the prosecution on the defendant's decision not to testify are constitutionally impermissible. In *Griffin v. California*, 380 U.S. 609 (1965), the United States Supreme Court held that *any* comment on an accused's silence violates the defendant's Fifth Amendment privilege against self-incrimination. The Court therefore reversed the defendant's murder conviction and capital sentence because, as in the present case, the prosecutor had mentioned in closing argument the defendant's failure to take the stand. Similarly, in *Williams v. State*, 445 So. 2d 798 (Miss. 1984), this Court vacated a death sentence because of prosecutorial misconduct including improper comment on the defendant's failure to offer sworn testimony.[55]

The sentence in this case as well must be vacated. The references to Mr. Jordan's failure to testify at his prior trials were highly prejudicial: they called into question the sincerity of Mr. Jordan's claim of an accidental homicide and remorse over the killing, critical issues in the sentencing proceeding.

The prosecutor's improper comments were not limited to remarks concerning the defendant's prior failure to

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to apologize to him because Edwina took off running. Didn't she have the right to run?" (A. 36-37; Tr. 1098).

At a subsequent point in his argument, the prosecutor reinforced his earlier remarks:

> "And then *seven years later* we come into the penalty stage right when we get down to many many years of effective prosecution. *Many many years we have worked on this case waiting for this very minute, and I'll be dadgum it, if he doesn't take the witness stand and say 'I'm sorry'*; 'I'm sorry that I did it, and I think I ought to have life imprisonment.'" (A. 37; Tr. 1102).

[55] *See also* Miss. Code Ann. § 13-1-9 (1972) (failure of defendant to testify shall not be commented on by counsel).

testify. His closing argument was filled with emotionally charged rhetoric and personal opinions, which had little, if anything, to do with the evidence presented at trial.[56]

Early in his argument, for example, the prosecutor argued that his personal views should be given weight:

> "You are going to hear the statement of counsel opposite about the duty and responsibility of the District Attorney's Office to prosecute and see that the death penalty is imposed.[57] But I tell you as I stand here, I am not a member of the District Attorney's Office. *I'm a Special Prosecutor;* I haven't been assigned to nor affiliated with the District Attorney's Office in seven (7) years. *I am not a proponent of the death penalty in every case.* I have never advocated that, and I don't advocate that to you today. But what I tell you is that there are cases that exist that warrant the imposition of the death penalty. *And I have never in my eleven (11) years of practice ever seen a case so atrocious, so cruel and inhumane, that justifies the death penalty as this particular case does.*" (A. 36; Tr. 1091-92).

These remarks were completely inconsistent with two basic tenets of permissible closing argument: that counsel refrain from providing personal opinion and from referring to events outside the record. *See, e.g., ABA Standards for Criminal Justice,* Stds. 3-5.8 to 3-5.9 (2d ed. 1980).[58]

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[56] Perhaps the most telling comment about the prosecution's closing argument was made by Special Prosecutor Owen himself. He told the jury that he saw no need to review the evidence presented, the precise purpose of closing argument. (A. 38; Tr. 1103).

[57] Defense counsel made no such statement.

[58] It is precisely because the opinions of counsel are likely to be given great weight by the jury that they are prohibited. *See* Vess,

The prosecutor invited the jury to be swayed by the state of our "society" generally and denigrated the defendant for insisting upon his constitutional rights:

> "You have seen this ordeal we have gone through for three days. It was the same thing when we tried it; seven, eight or nine days of trial. He is represented by counsel over there; he's got one on one side, and one on the other; one sitting here, and one back there. A doctor came in and testified for him. He got all of the Constitutional Rights afforded him; all these rights he got. And what did Edwina Marter get? A .38 projectile in the back of the head; two children without a mother; a husband without a wife; a bank in an uproar; and the entire county distraught over what has happened to our society. . . . And to think that we have got to spend days here arguing about whether or not she was running or standing still, when he had no business taking her out there in the first place. But that's the way our legal system is. He is afforded that right. He has a right to counsel; he has the right to make us prove she was on her knees, or standing still, and—'if I can maybe slip in some legal technicality, if I can employ some type of legal gymnastics, see, and I can get the Jury to believe that she was running and it was an accident, boy, I'm free; low, I have won it under the texture and the auspices of the Constitution.'" (A. 38; Tr. 1103-04).

These emotionally charged remarks, which asked the jury to punish the defendant because of the problems of "society" and for asserting his constitutional rights, alone

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Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument, 64 J. Crim. L. & Criminology 22, 28 (1973). For instance, the jury in this case had no basis for questioning the prosecutor's assertion that none of the cases he had seen in practice involved crimes as terrible as this one.

mandate reversal.[59] The prosecutor, however, continued his appeal to emotion by insisting that the jury focus on the effect its verdict would have on society and the victim's family:

> "Justice demands [the death penalty]. Edwina Marter demands it, and those two kids demand it. You [talk] about society; Kevin is now ten (10). He was three (3) when his mother died. The oldest son is seventeen (17). They are the ones who are going to look back and see what justice is. My momma was shot down in the woods with a .38, and her murderer got life imprisonment. —Cause momma was taken from the house, see." (A. 38; Tr. 1104).[60]

The prosecutor's remarks require reversal. This was not a proceeding to determine guilt or innocence in which prosecutorial misconduct can be brushed aside because of overwhelming evidence of guilt. Instead, the jury here was required to make the highly subjective determination of whether a defendant's crime was so egregious, when

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[59] *See United States v. Hughes*, 389 F.2d 535 (2d Cir. 1968) (reversing conviction based on prosecutor's comment that defendant was particularly "vicious because . . . he demanded his full constitutional rights").

[60] In his rebuttal argument, the prosecutor also suggested that the jury consider how Mrs. Marter's children would view the legal system if the defendant received a life sentence. (A. 40; Tr. 1154.) It has long been held improper for the prosecutor to refer to the victim or the victim's family. *See* Vess, *supra*, at 50 & n.233 (1973).

Nor was the prosecutorial misconduct confined to the closing argument. Throughout the trial the prosecutor seized on opportunities to make inflammatory remarks, as in his cross-examination of the prison guard, Lucius Brown. On at least six occasions during that examination, the prosecutor—over defense objections and a motion for a mistrial—emphasized that Mr. Jordan had previously been sentenced to death and had been on death row for as long as nearly any inmate. (A. 26-28; Tr. 861-69).

balanced with the mitigating circumstances, that he should not be allowed to live. Under the decisions of the United States Supreme Court and this court, the jury's consideration should have been confined to the relevant facts concerning the offense and the defendant. Mr. Jordan presented substantial mitigating evidence. There is simply no way to know what conclusion the jury would have reached if it had not been improperly influenced by the prosecutor's comments.

This Court, as well as others, has recognized that prosecutorial misconduct in the sentencing phase of a capital case must be scrutinized with particular care. Twice this year this Court has vacated capital sentences because of such misconduct. *Williams v. State, supra*; *Wiley v. State*, No. 54,642 (Miss. Jan. 4, 1984). The principle, which this Court has followed, has been stated thus:

> "The prosecutor's actions at the sentencing phase of this trial are viewed differently. At the sentencing phase of trial, the jury must not be influenced by any arbitrary factors. A prosecutor may not incite the passions of a jury when a person's life hangs in the balance." [61]

Because the prosecutor did exactly that in this case, the death sentence must be vacated.

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[61] *Brooks v. Francis*, 716 F.2d 780, 788 (11th Cir. 1983); *see also Hance v. Zant*, 696 F.2d 940, 951-53 (11th Cir. 1983). In both *Brooks* and *Hance*, the Eleventh Circuit vacated a capital sentence because the prosecutor's closing argument denied the defendant a fundamentally fair trial. As in the present case, the prosecutor in *Brooks* and *Hance* made highly emotional appeals for the jury to consider the effect its verdict would have on society generally.

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NO. 84-1738

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RICHARD GERALD JORDAN,
Petitioner

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

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EDITOR'S NOTE

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1. Where hearsay evidence relating to post crime prison behavior is excluded on the grounds of it being incompetent and not reasonably relevant to the question of whether petitioner should be sentenced to death or be sentenced to life in prison there is no violation of Lockett v. Ohio, 438 U.S. 586 (1978) or the requirement that there be individualized sentencing and certiorari should be denied.

2. The Court should deny the writ because the rationale underlying the strict interpretation of the statutory aggravating circumstances of "especially heinous, atrocious or cruel" in Godfrey v. Georgia, 446 U.S. 420 (1980) is not applicable under the Mississippi capital murder statutory framework.

3. Where the comments of the prosecutor during the closing arguments of the sentence phase relating to the fact that petitioner had not testified at previous trials did not violate any rights guaranteed under the Fifth, Sixth, Eighth, or Fourteenth Amendments certiorari should be denied.

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OCTOBER TERM, 1984

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VERSUS

STATE OF MISSISSIPPI,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Supreme Court of the State of Mississippi is reported as Jordan v. State, 464 So.2d 475 (Miss. 1985). A copy of the opinion is before the Court in petitioner's Appendix to Petition for Writ of Certiorari to the Supreme Court of Mississippi at 1a-33a.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. § 1257(3). He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendments Five, Six, Eight and Fourteen. He

also relies on Section 99-19-101, Miss. Code Ann. (Supp. 1984).

STATEMENT OF THE CASE

The petitioner, Richard Gerald Jordan, was indicted on March 26, 1976, in the Circuit Court of the First Judicial District of Harrison County, Mississippi for the January 13, 1976 kidnapping and murder of Edwina Marter. On motion for change of venue the matter was transferred to the Circuit Court of Jackson County, Mississippi where petitioner was tried and automatically sentenced to death. Within the time for the granting of a new trial the Mississippi Supreme Court decided Jackson v. State, 337 So.2d 1242 (Miss. 1976), holding that automatic imposition of the death penalty was improper. The trial court granted the motion for new trial and Jordan was again put to trial under the guidelines imposed by

the court in Jackson, supra, concerning jury sentencing. Jordan was again convicted of capital murder and sentenced to death, this time by the jury. The Mississippi Supreme Court affirmed on direct appeal and rehearing was denied. Jordan v. State, 365 So.2d 1198 (Miss. 1979). Certiorari was denied by this Court in Jordan v. Mississippi, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979). Petitioner then petitioned the State Supreme Court for post-conviction relief. This petition for writ of error coram nobis was denied. In re Jordan, 390 So.2d 584 (Miss. 1980).

On January 3, 1980 prior to filing his petition for coram nobis relief, Jordan filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Mississippi. These proceedings were stayed pending exhaustion of all claims in the state courts. On March 19, 1981 the

Honorable William Harold Cox, United States District Judge, denied the petition, and an appeal to the United States Court of Appeals for the Fifth Circuit ensued. On August 6, 1981, the Fifth Circuit affirmed in part and reversed in part the decision of the district court, vacating the sentence of death. Thereafter a petition for rehearing was denied. Jordan v. Watkins, 681 F.2d 1967, reh. den. sub. nom., Jordan v. Thigpen, 688 F.2d 395 (5th Cir. 1982). The State elected not to file a petition for writ of certiorari with this Court.

A new sentencing hearing was held by the Circuit Court of Harrison County, Mississippi, First Judicial District and a death sentence returned in proper form by the jury on April 29, 1983. This marked the third time that Jordan had been sentenced to death. On automatic appeal to the Mississippi Supreme Court the sentence of death was again affirmed

on January 30, 1985. Rehearing was denied on March 13, 1085. Jordan v. State, 464 So.2d 475 (Miss. 1985).

The facts reflected by the record show, that on or about January 10, 1976, in Baton Rouge, Louisiana, petitioner, traded a shotgun for a .38-caliber revolver. Then he came to Gulfport, Mississippi, and obtained lodging at the Twin Star Motel where he registered as "Jack Wilson." With kidnapping in his mind, and using the fictitious name of "Jack Wilson," Jordan called the Gulf National Bank and expressed a desire to speak to the commercial loan officer. He was referred to Mr. Marter, whose wife was soon to be Jordan's victim. Perusal of the telephone directory revealed to Jordan only one Gulfport listing of the name "Marter." Having obtained the Marter address from the directory, Jordan drove by the Marter residence where several cars were parked, including a Mercedes and a sports car. After

all but one of the cars was driven away, Jordan dialed the Marter residence telephone number and heard a female's voice answer. Then he decided to make his move.

Dressed in a sport coat, tie and knit pants, and carrying a manilla folder, Jordan went to the Marter residence. He rang the door bell and was greeted by Mrs. Marter whom he told that his electrical company had received information of defective circuit breakers in the area which he was investigating. Mrs. Marter admitted him inside, whereupon he kidnapped Mrs. Marter at gunpoint and took her away, leaving her three-year-old son asleep in the house. At his command, she drove him out into the sparsely settled DeSoto National Park wooded area. They traveled down a logging road to where he ordered her out of the car, telling her that she would stay there with his partner until he obtained money from her husband, after which he would release her. She became

extremely fearful when she discovered there was no partner there, and petitioner forced her onto her knees and shot her in the back of the head. [1] He then went to a telephone and called Mr. Marter at the bank. Demanding $25,000, Jordan stated: "We have your wife . . ." and gave Marter directions how to deliver the money up on Highway 49. Marter quickly obtained the money, but his efforts to drop it where directed failed because he did not find the coat (beside the highway) upon which he was supposed to drop the money. Being fearful on account of two vehicles following Marter, Jordan had decided not to put out the coat.

Jordan took the .38-caliber revolver (the murder weapon) and threw it into the Big Biloxi River, from which it was later recovered after

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[1] Jordan, a self-described marksman, claims he shot Marter in the back of the head as she was running away from him.

he revealed its location. Before Mr. Marter again attempted to deliver the money as directed by a second telephone call from Jordan, the money was serialized and microfilmed with FBI officers then actively investigating the matter. During this second telephone conversation between Jordan and Mr. Marter, Jordan assured Marter that his wife was all right, and demanded that Marter drop the money on Interstate Highway 10. Marter proceeded as Jordan directed; this time he found the coat and dropped the money on it. Two officers, Deputy Sheriff Larkin Smith and FBI Agent Shepherd, having been made aware of what was going on, were positioned near the scene of the drop and saw Jordan place a coat there. Soon they saw him pick up the money, after which they gave chase as high speed. During the chase, Jordan rammed his car into the vehicle of the officers, running them off the road. They shot at his receding car, but

Jordan continued his flight although his car was rendered partially disabled when, in the ramming episode, a bent fender came in contact with a tire. Farther on, Jordan abandoned his vehicle at a shopping center, hide the money in the woods, went to another shopping center, and, at a T. G. & Y. store, purchased a red jump-suit which he donned before he left the store. He got a taxi at the shopping center and told the driver to take him to the Twin Star Motel. Not knowing that Jordan was the man for whom a large search was under way, the taxi driver told Jordan that roadblocks were up and that the officers were looking for someone. En route to the motel, the taxi was stopped and an officer identified Jordan from a picture already obtained by the FBI. The officer arrested Jordan and turned him over to the FBI. That afternoon, January 13, 1976, Mrs. Marter's body was found. On the next day

a diver from the Gulfport Fire Department retrieved the murder weapon from the river.

REASONS FOR DENYING THE WRIT

Petitioner has presented no federal question of sufficient substance that would warrant the granting of this petition for writ of certiorari.

ARGUMENT

1. WHERE HEARSAY EVIDENCE RELATING TO POST CRIME PRISON BEHAVIOR IS EXCLUDED ON THE GROUNDS OF IT BEING INCOMPETENT AND NOT REASONABLY RELEVANT TO THE QUESTION OF WHETHER PETITIONER SHOULD BE SENTENCED TO DEATH OR BE SENTENCED TO LIFE IN PRISON THERE IS NO VIOLATION OF LOCKETT V. OHIO, 438 U.S. 586 (1978) OR THE REQUIREMENT THAT THERE BE INDIVIDUALIZED SENTENCING AND CERTIORARI SHOULD BE DENIED

Relying on Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978), petitioner cites four instances in which he

claims that he was precluded from adducing, as a mitigating factor, certain aspects of his character or record.

Upon review of the authorities primarily relied upon by defendant Lockett, supra, Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct.869 (1982), etc., and their progeny, Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), etc., one notes that while recounting the fact that the states may not limit, either by statute or instruction, the jury's right to consider proof of any circumstance or combination of circumstances surrounding the life and character of the defendant that would be reasonably relevant to the question of whether he should suffer death or be sentenced to life in prison, there has not been a plethora of discussion on the actual particular rules of evidence applicable to sentencing procedures. After extensive

research on the question we have found only (4) Federal cases discussing this precise question. See: Shriner v. Wainwright, 715 F.2d 1452 (11th Cir. 1983) (description of death by electrocution not admissible); Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), rv'd on other grounds, ___ U.S. ___, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) (description of execution by lethal gas not admissible); Young v. Zant, 727 F.2d 1489 (1984) (testimony concerning the type of rehabilitative program that could return petitioner to useful member of society properly excluded).

The fourth and probably most instructive was the Supreme Court's discussion of the application of the Georgia rules of evidence to the sentencing phase in Green v. Georgia, 442 U.S. 95, 60 L.Ed.2d 788, 99 S.Ct. 2150 (1979). Focusing on a situation quite similar to that in Chambers v. Mississippi, 410 U.S. 284, 83 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the Georgia

courts excluded the testimony of a third party during the sentencing phase to the effect that Green's co-defendant had stated that he and not Green was the perpetrator of the crime. In reversing the Georgia Supreme Court, this Court in Green, supra, stressed the unique factual case presented stating:

> Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, see Lockett v. Ohio, 438 U.S. 586, 604-605, 57 L.Ed.2d 973, 98 S.Ct. 2954, 9 Ohio Ops. 3d 26 (1978) (plurality opinion); id., at 613-616, 57 L.Ed.2d 973, 98 S.Ct. 2954, 9 Ohio Ops., 3d 26 (opinion of Blacksun, J.), and substantial reasons existed to assume its reliability. Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it. Perhaps most important, the State

> considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it. In these unique circumstances, "the hearsay rule may not be applied mechanistically to defeat the ends of justice. Chambers v. Mississippi, 410 U.S. 284, 302, 35 L.Ed.2d 297, 93 S.Ct. 1038 (1973). Because the exclusion of Pasby's testimony denied petitioner a fair trial on the issue of punishment, the sentence is vacated and the case is remanded for further proceedings not inconsistent with this opinion.
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> 442 U.S. at 97.

The Court of Appeals for the Fifth Circuit commented on Green in Barefoot v. Estelle, 697 F.2d 593 (5th Cir. 1983), Aff'd,___ U.S.___, 77 L.Ed.2d 1090, 103 S.Ct. 3383 (1983):

> In Green, the state court excluded evidence that the accused's codefendant had actually killed the victim. This evidence consisted of a hearsay statement by the codefendant to a friend. The Court reversed stating:
>
> > Regardless of whether the proferred testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to

> a critical issue, in the punishment phase of the trial . . . . (emphasis added)
>
> 442 U.S. at 97, 99 S.Ct. at 2151. We think that Green is limited to its facts, and certainly did not federalize the law of evidence. It does, however, indicate that certain egregious evidentiary errors may be redressed by the due process clause.
>
> 697 F.2d at 597.

Several conclusions and deductions can be made from these cases. First, it is obvious that while the rules of evidence have been relaxed they certainly have not been abolished. In this regard, we note that a defendant may not be precluded from producing evidence on any aspect of his life, character and record or any circumstance of the offense in mitigation of sentence. Second, while proof is guided by the bounds of relevancy, there are other rules of evidence which may come to bear; i.e., competency, privilege, materiality, etc. We doubt anyone would question the exclusion of hearsay testimony where the declarant is available to testify, or the introduction of

privileged testimony over the objection of the one entitled to invoke the privilege. As the Fifth Circuit pointed out in Barefoot, in light of Chambers, under Green we must assume that within certain boundaries the rules of competency still apply at sentencing.

Generally speaking, relevancy has been defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." Rule 401, Fed. R. Evid. Looking briefly to hornbook law we find that McCormick has noted:

> Relevancy in logic is the tendency of evidence to establish a proposition which it is offered to prove. Relevancy, as employed by judges and lawyers, however, is the tendency of the evidence to establish a material proposition. Thus, as James points out, "evidence may be excluded as 'irrelevant' for two quite distinct reasons: because it is not probative of the proposition at which it is directed, or because that

proposition is not provable in the case."

McCormick, Evidence at p. 435 (1972).

Following the Green/Barefoot line of authority it is clear that the effort to introduce evidence of Jordan's invention through Russell was hearsay and could have properly been introduced through Jordan when he took the stand. Testimony regarding the invention from Jordan would not have been "objectionable on the ground of hearsay testimony, and he may have been able to establish it as being relevant in his behalf." As the court below stated, Jordan "was not interrogated by his counsel as to, nor did he attempt to testify to, the matters sought to be elicited from Rhett Russell." 464 So.2d at 485.

Looking to the testimony introduced through Lucius Brown relative to Jordan's incarceration in the Maximum Security Unit we find that it clearly shows that some degree of trust was placed in Jordan and that he had a

relatively clean disciplinary record while incarcerated. Brown's subjective opinions concerning Jordan's cooperativeness and trustworthiness were irrelevant to the matter at hand. Also, without more, Brown was not qualified to give an opinion as to whether or not Jordan could be rehabilitated. There was no effort to qualify Brown as an expert in any field dealing with rehabilitation of prisoners.

Jordan's cousin, Shirley Thames, had not seen Jordan since 1973, some ten (10) years prior to this trial and some three (3) years prior to the commission of the crime. She was allowed to testify with considerable latitude as to certain familial traits exhibited by Jordan and his reputation for violence. The only objections sustained were to specific questions concerning petitioner's relations with his wife of which she had no personal knowledge. This was clearly hearsay and not admissible.

Finally, we note that defendant's brother Robert H. Jordan was allowed to testify that his brother had a good reputation for peace and violence in the community. The only objection came when the brother was asked to explain why this was so. The rule in Mississippi and under the Federal Rules of Evidence is that you may not prove character traits by proof of specific past actions. One is limited to offering testimony as to general reputation. Winters v. State, 449 So.2d 766, 768-69 (Miss. 1984); Rule 608, Fed. R. Evid. There was no error here.

In any event it can hardly be said that the testimony concerning petitioner's actions and behavior while he was sitting on death row could be relevant in this case. The entire time petitioner was on death row he was either fighting the death sentence he was under or preparing for retrial on the issue of sentence once he had been successful in getting the

original sentence overturned. There is no indicia of reliability in the manner in which petitioner conducts himself while on death row while under a death sentence. It can do nothing but benefit him become the model prisoner and to set himself to some outwardly worthwhile task. It tells us nothing that is relevant to his receiving the death sentence on retrial. Petitioner's whole reason for conducting himself as he does on death row is skewed to meet the demands of offering mitigating circumstances on retrial.

The case here is not the case found in Green, supra, as the issue petitioner wished to introduce did not go to the very heart of the sentencing process. The evidence related to matters only tenuously connected with the issues on sentencing. The provisions of the Mississippi statute are constitutional both as written and applied. There being no violation

of the federal constitutional rights guaranteed petitioner certiorari should be denied.

2. THE COURT SHOULD DENY THE WRIT BECAUSE THE RATIONALE UNDERLYING THE STRICT INTERPRETATION OF THE STATUTORY AGGRAVATING CIRCUMSTANCES OF "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" in GODFREY V. GEORGIA, 446 U.S. 420 (1980) IS NOT APPLICABLE UNDER THE MISSISSIPPI CAPITAL MURDER STATUTORY FRAMEWORK

We begin our consideration of this subject with a discussion of the elemental framework of the statute. A comparative review of the capital murder statutory framework in this country varies arithmetically with the number of states. Practically speaking no two statutes are alike. Eg., Compare the statutory framework discussed in Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976). Of the aforesaid, the substantive definition of capital murder in Mississippi

resembles that of Texas, Vernon's Tex. Code Ann., Penal Code § 19.03, more so than any other state. Jackson v. State, 337 So.2d 1242 (Miss. 1976).

Capital murder is substantively defined in Miss. Code Ann. § 97-3-19(2) (Supp. 1983) as:

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> (a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman . . .;
>
> (b) Murder which is perpetrated by a person who is under sentence of life imprisonment;
>
> (c) Murder which is perpetrated by any use or detonation of a bomb or explosive device;
>
> (d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principles;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, sexual battery, unnatural intercourse with any child under the age of twelve (12), or non-consensual unnatural intercourse with mankind, or in any attempt to commit such felonies;

(f) When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felony;

(g) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

This Court has recently discussed capital sentencing as a narrowing concept. In California v. Ramos, ____ U.S. ____, 77 L.Ed.2d 1171, 103 S.Ct. 3446 (1983), Justice O'Conner speaking for the Court stated:

> In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the procedure by which the State

imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of person eligible for the death penalty. In Gregg v. Georgia, 426 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976), and its companion cases, the Court reviewed the capital sentencing schemes of five states to determine whether those schemes had cured the constitutional defects identified in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972). In Gregg itself, the joint opinion of Justice Stewart, Powell, and Stevens concluded that the Georgia sentencing scheme met the concerns of Furman by providing a bifurcated proceeding, instruction on the factors to be considered, and meaningful appellate review of each death sentence. 428 U.S. at 189-195, 49 L.Ed.2d 859, 96 S.Ct. 2909 (opinion of Stewart, Powell, and Stevens, J.J.). Satisfied that these procedural safeguards "suitably directed and limited" the jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action," id., at 189, 49 L.Ed.2d 859, 96 S.Ct. 2909, the joint opinion did not undertake to dictate to the state the particular substantive factors that should be deemed relevant to the capital sentencing decision. Indeed, the joint opinion observed: "It seems clear that the problem [of channeling jury discretion] will be alleviated if the jury is given

guidance regarding the factors about the crime and the defendant that the state, representing organized society, deems particularly relevant to the sentencing decision." Id., at 192, 49 L.Ed.2d 859, 96 S.Ct. 2909 ("the deference we owe to the decisions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'").

77 L.Ed.2d at 1179-80.

In Zant v. Stephens, ____ U.S. ____, 77 L.Ed.2d 235, 247-52, 103 S.Ct. ____ (1983) the Court elaborated upon the "narrowing" concept:

> In Georgia, unlike some other States, the jury is not instructed to give any special weight to any aggravating circumstances, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard. Thus, in Georgia, the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of person convicted of murder who are eligible for the death penalty. For this reason, respondent argues that Georgia's statutory scheme is invalid

under the holding in Furman v. Georgia.

A fair statement of the consensus expressed by the Court in Furman is "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909 (1976) (opinion of Stewart, Powell, and Stevens, J.J.) After thus summarizing the central mandate of Furman, the plurality opinion in Gregg set forth a general exposition of sentencing procedures that would satisfy the concerns of Furman, id., at 189-195, 49 L.Ed.2d 859, 96 S.Ct. 2909. But it expressly stated, "We do not intend to suggest that only the above-described procedures would be permissible under Furman or that any sentencing system constructed along these general lines would inevitable satisfy the concerns of Furman, for each distinct system must be examined on an individual basis." Id., at 195, 49 L.Ed.2d 859, 96 S.Ct. 2909. The opinion then turned to specific consideration of the constitutionality of Georgia's capital sentencing procedures. Id., at 196-207, 49 L.Ed.2d 859, 96 S.Ct. 2909.

Georgia's scheme includes two important features which the plurality described in this general

discussion of sentencing procedures that would guide and channel the exercise of discretion. Georgia has a bifurcated procedure, see id., at 190-191, 49 L.Ed.2d 859, 96 S.Ct. 2909, and its statute also mandates meaningful appellant review of every death sentence, see id., at 195, 49 L.Ed.2d 859, 96 S.Ct. 2909. The statute does not, however, follow the Model Penal Code's recommendation that the jury's discretion in weighting aggravating and mitigating circumstances against each other should be governed by specific standards. See id., at 193, 49 L.Ed.2d 859, 96 S.Ct. 2909. Instead, as the Georgia Supreme Court has unambiguously advised us, the aggravating circumstances merely performs the function of narrowing the category of person convicted of murder who are eligible for the death penalty.

Respondent argues that the mandate of Furman is violated by a scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute. But that argument could not be accepted without overruling our specific holding in Gregg. For the Court approved Georgia's capital sentencing statute even though it clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's

consideration of aggravating and mitigating circumstances.

The plurality's approval of Georgia's capital sentencing procedure rested primarily on two features of the scheme: That the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, and that the state supreme court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate. These elements, the opinion concluded, adequately protected against the wanton and freakish imposition of the death penalty. This conclusion rested, of course, on the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of Furman itself. For a system "could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur." 428 U.S. at 195, n. 46, 49 L.Ed.2d 589, 96 S.Ct. 2909. To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Thus, in Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1930), the Court struck down an aggravating circumstance that failed to narrow the class of persons eligible for the death penalty. Justice Stewart's opinion for the plurality concluded that the aggravating circumstance described in subsection (b)(7) of the Georgia statute, as construed by the Georgia Supreme Court, failed to create any "inherent restraint on the arbitrary and capricious infliction of the death sentence," because a person of ordinary sensibility could find that almost every murder fit the stated criteria. Id., at 428-429, 64 L.Ed.2d 398, 100 S.Ct. 1759. Moreover, the facts of the case itself did not distinguish the murder from any other murder. The plurality concluded that there was "no principled way to distinguish this case, in which the death penalty was imposed from the many in which it was not." Id., at 433, 64 L.Ed.2d 398, 100 S.Ct. 1759. Our cases indicate, then, that statutory aggravating circumstances play a constitutionality necessary function at the stage of legislative definition; they circumscribe the class of person eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting; from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage

is an individualized determination on the basis of the character of the individual and the circumstances of the crime. See Eddings v. Oklahoma, 455 U.S. 104, 110-112, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982); Lockett v. Ohio, 438 U.S. 586, 601-605, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978) (plurality opinion); Roberts (Harry) v. Louisiana, 431 U.S. 633, 636-37, 52 L.Ed.2d 637, 97 S.Ct. 1992 (1977); Gregg, supra, at 197, 49 L.Ed.2d 859, 96 S.Ct. 2909 (plurality opinion); Proffitt v. Florida, 428 U.S. at 251-252, 49 L.Ed.2d 912, 96 S.Ct. 2960 (plurality opinion); Woodson v. North Carolina, 429 U.S. 280, 303-304, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976) (plurality opinion).

The Georgia scheme provides for categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage. We therefore must remain convinced, as we were in 1976, that the structure of the statute is constitutional. Moreover, the narrowing function has been properly achieved in this case by the two valid aggravating circumstances upheld by the Georgia Supreme Court - that respondent has escaped from lawful confinement, and that he had a prior record of conviction for a capital felony. These two findings adequately differentiate this case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be

> imposed. Moreover, the Georgia Supreme Court in this case reviewed the death sentence to determine whether it was arbitrary, excessive, or disproportionate. Thus the absence of the legislative or court-imposed standards to govern the jury in weighing the significance of either or both of those aggravating circumstances does not render the Georgia capital sentencing statute invalid as applied in this case.

We note in particular discussion of this concept in the context of statutes like those in Texas and Mississippi by the Court in Zant v. Stephens, supra.

> The plurality opinion issued the same day in Jurek v. Texas, 428 U.S. 262, 49 L.Ed.2d 929, 96 S.Ct. 2950 (1976), makes clear that specific standards for balancing aggravating circumstances are not constitutionally required. In Jurek we held that the State's action in "narrowing the categories of murders for which a death sentence may ever be imposed" served much the same purpose as the lists of statutory aggravating circumstances that Georgia and Florida had adopted. Id., at 270, 49 L.Ed.2d 929, 96 S.Ct. 2950. We also held that one of the three questions presented to the sentencing jury permitted the defendant to bring mitigating circumstances to the jury's attention. Id., at 273-274, 40

> L.Ed.2d 929, 96 S.Ct. 2950. Thus, in Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution and certainly were not explicitly balanced against each other.
>
> 77 L.Ed.2d at 429, n. 13.

Therefore, by narrowing the categories of murder in which the death sentence may be imposed at the inception of the case, Mississippi has complied with the constitutional mandate of Jurek and Stephens. Consequently, the aggravating factors found in Miss. Code Ann. § 99-19-101 (Supp. 1984) do not serve the same purpose in Mississippi as they do, for instance, as in Florida or Georgia. We note that the arguments advanced by petitioner have been rejected by the Mississippi Supreme Court in several recent cases. Billiot v. State, 454 So.2d 455 (Miss. 1984), cert. denied, _____ U.S. _____ (No. 84-5783, 1985); Edwards v. State, 441 So.2d 84 (Miss. 1983); Tokman v. State, 435 So.2d 664 (Miss. 1983),

cert. denied, ____ U.S. _____, 104 S.Ct. 3547, 82 L.Ed.2d 850 (1984); Gilliard v. State, 428 So.2d 576 (Miss. 1983), cert. denied, _____ U.S. ____ (No. 82-6775, 1983); Evans v. State, 422 So.2d 737 (Miss. 1982), cert. denied, ____ U.S. _____ (No. 82-6267, 1983); Bullock v. State, 391 So.2d 601 (Miss. 1980), cert. denied, 452 U.S. 931 (1981); Culberson v. State, 379 So.2d 499 (Miss. 1980), cert. denied, 449 U.S. 986 (1980); Reddix v. State, 381 So.2d 999 (Miss. 1980), cert. denied, 449 U.S. 986 (1980); Jones v. State, 318 So.2d 933 (Miss. 1980), cert. denied, 449 U.S. 1003 (1980). See also: Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), reh. denied, 685 F.2d 139 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983), reh. denied, 462 U.S. 1124 (1983).

Summarizing the foregoing, we find that Stephens, Barclay, ___U.S.___, 77 L.Ed.2d 1134, 103 S.Ct. 3418 (1983), and Romas reflect a clear understanding and acceptance of diverse methods of achieving a narrowing of the class

of persons eligible for the death penalty and thereby justifying the imposition of a more severe sentence. Viewed in proper context, Stephens turns heavily on consideration of the Georgia death penalty statute, a scheme whereby any first degree murderer may receive the death penalty where one or more aggravating circumstande is found. Thus, the only narrowing in the Georgia system takes place in the finding of aggravating circumstances. Cf., Godfrey v. Georgia, 446 U.S. 420 (1980). Conversely, in Mississippi capital defendants must satisfy more than the single criterion on intentional murder. Built into the structure is a requirement that some added element be present; i.e., an accompanying felony, law officer as victim, etc. See ?Miss. Code Ann. § 99-3-19 (Supp. 1983). In other words, as the Court noted in Jurek, supra, Mississippi has incorporated many of the aggravating circumstances found in the Florida and Georgia

statutes in its definition of the substantive offense. Increasing the protection to the defendant is the requirement that circumstances supporting or diminishing the death sentence be weighed one against the other. In sum, the Mississippi statute is unique and there is no valid compulsion for measuring its constitutionality solely in deference to a separate and different system of thought and practice. The distinguishing process required from state to state was recognized in Stephens. States may vary their respective procedures so long as the penalty phase provides for an "individualized determination on the basis of the character of the individual and the circumstances of the crime." Stephens, 77 L.Ed.2d at 251.

Within the context of the Stephens, Barclay, and Ramos line of cases, Mississippi has narrowed the classes of individuals eligible to receive a death sentence by

limiting the situation in which the crime may be charged. Consequently, the potential abuse discussed in Godfrey could not arise in Mississippi. Additionally, the State has established certain procedural safeguards in the form of a required finding of an aggravating circumstances beyond a reasonable doubt and the required weighing of aggravating and mitigating circumstances to suitably limit and direct the jury's discretion so as to minimize the risk of arbitrary and capricious action.

Upon consideration of the statutory scheme as a whole, the aggravating circumstances in Mississippi do not serve in part the same purposes of functions as those in Georgia. In particular one of the principal functions of aggravating circumstances in the Georgia scheme is to limit those eligible for death. This function in Mississippi is served by the substantive definition of the crime. The

aggravating and mitigating circumstances, on the other hand, were included within the system in order to give the jury sufficient tools to give individualized consideration to the character and life of the defendant and his crime.

In limiting the circumstances in which death may be imposed and in providing a procedural system by which the jury before passing sentence may undertake an individualized consideration of the defendant and his crime, Mississippi has accomplished the required "narrowing" and by such "suitably directed and limited the jury's discretion so as to minimize the risk of wholly arbitrary and capricious action . . . ." Ramos, 77 L.Ed.2d at 1179. Such is all the Constitution requires. The State is, therefore, free to establish and define the aggravating circumstances it deems appropriate without interference from the

Federal judiciary. Ramos, supra; Barclay, supra.

Respondent, therefore, submits that the claim lacks merit and certiorari should be denied.

3. WHERE THE COMMENTS OF THE PROSECUTOR DURING THE CLOSING ARGUMENTS OF THE SENTENCE PHASE RELATING TO THE FACT THAT PETITIONER HAD NOT TESTIFIED AT PREVIOUS TRIALS DID NOT VIOLATE ANY RIGHTS GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH, OR FOURTEENTH AMENDMENTS CERTIORARI SHOULD BE DENIED.

In the court below petitioner raised allegations that the prosecutor made improper references to his prior exercise of his Fifth Amendment right not to testify and that he made "other highly improper and prejudicial remarks." His major thrust below was that it was improper to comment on the fact that petitioner was silent in his two prior trials, only minor mention was made of the other parts of the argument. On this petition he now

raises this same issue here; however, he has made substantial alterations in the thrust of the argument raising things that he did not present to the court below. The thrust of the argument now is the "other highly improper and prejudicial remarks". We must look to see which of those were presented to the court below and which were not as petitioner has made no distinction. Those things in this argument that were not specifically raised below or addressed by the court below cannot be raised here for the first time. Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981); Street v. New York, 394 U.S. 576, (1969); Cardinale v. Louisiana, 394 U.S. 437 (1969).

The argument petitioner made the cornerstone of his argument below only merits two paragraphs here. We find from the record from the prior two (2) trials indicates that Jordan elected not to testify either at the

culpability or sentencing stages of trial. Based on substantial evidence, including three (3) confessions, he was found guilty. Only during the resentencing hearing conducted after a grant of habeas corpus relief by the Court of Appeals for the Fifth Circuit did Jordan elect to testify in his own behalf.

Jordan's testimony in this resentencing proceeding was substantially more than a plea for mercy and directly refuted evidence introduced during the earlier guilt phase of his trial. He stated that his comments concerning his marksmanship were not true, and he explained to the jury his version of how the murder occurred. Specifically, he told the jury that he did not intentionally shoot Mrs. Marter and that the killing was accidential.

Petitioner relies here on Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Griffin chose not to testify during the culpability portion of his

bifurcated capital trial, but he did testify at the sentencing hearing. The trial judge in Griffin instructed the jury that is was permissible to draw unfavorable inferences from the defendant's failure to testify. The prosecutor's comments and the judge's instruction were on the issue of guilt that occurred before the jury reached its verdict. The Court held that it is unconstitutional for the prosecutor to comment on the defendant's silence during trial by suggesting an inference of guilt from the defendant's failure to testify in refutation of facts within his knowledge.

The Griffin circumstances are similar to those of the instant case, however, two (2) salient facts are different. First, in addition to the prosecutor's comment the court, in Griffin, instructed the jury that it could make unfavorable inferences from the defendant's silence. In the instant case, the

prosecutor's comment was not designed to suggest an inference of guilt, for guilt had already been determined, but rather the prosecutor's comment was intended to impeach petitioner's credibility. Second, in Griffin, the comment and instruction occurred during the culpability phase of the capital trial and before the defendant testified at the sentencing hearing. Here, the prosecutor's comment occurred after guilt had been determined and after the defendant had voluntarily testified during the sentencing hearing. Griffin therefore does not offer petitioner any solace.

The court below correctly relied on Calloway v. Wainwright, 409 F.2d 59 (5th Cir. 1968) and Tucker v. Francis, 723 F.2d 1504 (11th Cir. 1984) in deciding the issue at hand. The Mississippi Supreme Court stated:

> We distinguish that case [Griffin v. California] from the case sub judice. In Calloway v.

Wainwright, 409 F.2d 59 (5th Cir. 1968), the Court said:

> It is clear that when a defendant voluntarily testifies to the merits, and not just upon a purely collateral matter, the prosecutor may comment upon the defendant's failure to deny or explain incriminating facts already in evidence.

In Tucker v. Francis, 723 F.2d 1504, 1511-12 (11th Cir. 1984), the Court addressed the question in the following language:

> It is not fundamentally unfair to comment on the appellant's silence during the culpability phase as juxtaposed with his exculpatory testimony during the sentencing phase. A defendant is usually told that so long as he does not testify, his failure to testify will not be used against him. In this case, Richard Tucker's failure to testify was not used against him during that portion of his trial in which he invoked the fifth amendment. After he waived his fifth amendment privilege by testifying, any expectations of protection from adverse comment also were waived.

See also Raffel v. United States, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054 (1926); McGahee v. Massey, 667 F.2d 1357

(11th Cir. 1982) on waiver.

464 So.2d at 482.

The court below was correct in its analysis and certiorari should be denied.

The "other highly improper and prejudicial remarks" section of petitioner's argument below has now been blown into the major portion of his argument here. The only thing that petitioner fails to point out is that the court below did not address any other issues concerning the arguments of counsel. This was correct as those errors were not properly preserved for argument in the court below by a contemporaneous objection. There were only two objections made during the entire closing argument of the prosecution. These two objections are found in the transcript on pages 1091 and 1104-05. See: App. 64a and 74a-75a. The one found on page 1091, 64a, related to the mention of the fact that petitioner did not testify in his prior trials. That issue has

been dealt with above. The second and final objection raised at trial was to the following comment:

> Justice demands it. Edwina Marter demands it, and those two kids demand it. You talking about society; Kevin is not ten (10). He was three (3) when his mother died. The oldest son is seventeen (17). They are the ones who are going to look back and see what justice is. My momma was shot down in the woods with a .38, and her murderer got life imprisonment.--Cause momma was taken from the house, see.
> BY MR. STEGALL: We are going to object to that sort of argument.
> BY THE COURT: Overruled.

Tr. 1104-05, 74a-75a.

Once the objection was overruled the prosecutor did not return to the subject. The argument was completed without further objection by the petitioner. It is true that petitioner raised this in his brief before the Mississippi Supreme Court and because of the objection the question was properly before the court below. App. 95a. The court below did not address the issue; therefore, this Court

does not have jurisdiction to consider the matter under the ruling of Cardinale, supra. The Court stated:

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet. 368, 9 L.Ed. 458 (1863), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344, 3 L.Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. If both of these do not appear on the record, the appellate jurisdiction fails. 10 Pet. 368, 391, 9 L.Ed. 458, 467.

[Emphasis added] 22 L.Ed.2d at 400.

The ruling in Cardinale, supra, is the complete answer to the question, we cannot speculate what the decision of the court below would have been had they spoken to the issue. It is interesting to note that petitioner did not raise the fact that the question had not been addressed in his petition for rehearing in

the court below, the proper place to have raised such a question. Can it be said that petitioner has abandoned the claim by not raising it before the court below on petition for rehearing.

The two comments mentioned above are the only two alleged errors properly preserved by petitioner for presentation in the Court below. The other portions of the argument that petitioner now raises were not objected to at trial and, therefore, not properly preserved for presentation to the court below. In Hill v. State, 432 So.2d 427 (1983), the Mississippi Supreme Court stated:

> In this case, however, there was no objection made to this argument. We have consistently held that contemporaneous objection must be made to improper argument by the state, and unless such objection is made, any claimed error for such improper argument will not be considered on appeal. See Coleman v. State, 378 So.2d 640 (Miss. 1979); Thomas v. State, 358 So.2d 1311 (Miss. 1978); Griffin v. State, 292 So.2d 159 (Miss. 1974); Myers v.

State, 268 So.2d 353 (Miss. 1972); Peterson v. State, 242 So.2d 420 (Miss. 1970); Ford v. State, 227 So.2d 454 (Miss. 1969); Showers v. State, 227 So. 452 (Miss. 1969); and Coburn v. State, 250 Miss. 684, 168 So.2d 123 (1964). It need also be noted that this holding has applied to death penalty cases, as well as other criminal and civil cases.

432 So.2d at 439-40.

This Court has no jurisdiction to pass on these alleged errors. Webb v. Webb, supra, states:

> We note first that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon. Nor is any federal issue mentioned by the dissenting opinion in that court. This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."

368 L.Ed.2d at 396.

See: Street v. New York, supra; Chambers v. Mississippi, 410 U.S. 284 (1973); Bailey v. Anderson, 326 U.S. 203 (1945). The facts

support the assumption that the issue was not properly raised below.

There being no question of substantial constitutional merit raised certiorari should be denied.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for writ of certiorari in this case should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., a Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing **Brief in Opposition** to the following:

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This, the 20th day of July, 1985.

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Supreme Court, U.S.
FILED
AUG 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1783

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

RICHARD GERALD JORDAN,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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REPLY BRIEF FOR PETITIONER

Richard Gerald Jordan (Petitioner) submits this reply to the arguments presented by the State of Mississippi (Respondent) in its brief in opposition to the petition for a writ of certiorari to the Supreme Court of Mississippi.

Respondent's brief contains a number of misstatements concerning the record. While most of these misstatements are not material to the issues at hand, we note the following: Although Respondent states that "petitioner forced [the victim] onto her knees and shot her in the back of the head," [1] it cites absolutely no support in the record for this assertion. Petitioner has consistently maintained that he shot the victim, without intent to kill, after she had started to run away,[2] and the jury's findings are consistent with this version of the facts.[3]

ARGUMENT

I.

Respondent argues that the evidence of Petitioner's behavior and accomplishments while in prison was properly excluded as irrelevant. This argument flatly contradicts the decision of a plurality of this Court in *Lockett v. Ohio*, 438 U.S. 586 (1978), that in a capital sentencing hearing a defendant must be permitted to adduce evidence of "any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." [4]

Respondent cannot seriously maintain that the evidence excluded here had no bearing on Petitioner's character or record. Rather, Respondent asserts in effect that

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[1] Respondent's Brief in Opposition at 8.

[2] *See* Petition for Writ of Certiorari at 4 & n.6.

[3] *See* 464 So. 2d at 480, App. 7a (jury did not find that Petitioner intended to kill, instead finding that he "contemplated lethal force [would] be employed").

[4] 438 U.S. at 604 (footnote omitted).

the evidence of Petitioner's post-crime behavior and record is suspect because it is self-serving. Indeed, Respondent appears to suggest that *any* evidence of the post-crime behavior of a capital defendant is excludable:

> [I]t can hardly be said that the testimony concerning petitioner's actions and behavior while he was sitting on death row could be relevant in this case. The entire time petitioner was on death row he was either fighting the death sentence he was under or preparing for retrial on the issue of sentence once he had been successful in getting the original sentence overturned. . . . It can do nothing but benefit him [to] become the model prisoner and to set himself to some outwardly worthwhile task. It tells us nothing that is relevant to his receiving the death sentence on retrial.[5]

Respondent's argument, if credited at all, would go to the weight of the evidence, not its admissibility. Respondent was free to argue to the jury that Petitioner's testimony should be discounted as self-serving. But Respondent's position that the post-crime behavior of a capital defendant is per se excludable, as irrelevant, flies in the face of *Lockett*.

Indeed, the dissent of four justices below is testimony that many citizens would have considered Petitioner's behavior quite significant. Although Respondent would have this Court believe the contrary, not every death-row inmate spends his time in prison productively making a substantial invention that can benefit society. As the dissent below recognized, evidence that Petitioner here did so could very well have made the difference between life and death for Petitioner. To quote Justice Robertson below, "Not all of us are without the capacity to see as proper the amelioration of the harshness of the law in the face of genuine repentance, pursuit of atonement and demonstrably responsible behavior." [6]

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[5] Respondent's Brief in Opposition at 20-21.

[6] 464 So. 2d at 491, App. 30a (Robertson, J., concurring in part and dissenting in part).

Respondent's other arguments on this issue, also have no merit. As noted by the dissent below,[7] the record shows that the excluded testimony would not have been hearsay, and the trial judge did not exclude the evidence on hearsay grounds.[8] But, even if one assumes arguendo that the excluded testimony would have been hearsay, it nevertheless should have been admitted. *Green v. Georgia*, 442 U.S. 95 (1979) (per curiam), does not permit the mechanical application of the hearsay rule to exclude evidence of mitigating circumstances in capital sentencing proceedings.[9] The majority below completely ignored *Green*, and Respondent seeks to distinguish *Green* by asserting that the evidence "did not go to the very heart of the sentencing process."[10] Yet, as Justice Robertson eloquently stated, the testimony about Petitioner's capacity to contribute to society *did* go to the heart of the life-or-death decision.[11]

II.

Respondent does not deny that the trial judge gave the jury no guidance whatsoever regarding the proper limits of the aggravating circumstance "especially heinous, atrocious or cruel." Nor does Respondent deny that the Mississippi Supreme Court did nothing on appeal to

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[7] *Id.* at 489, App. 27a.

[8] The colloquy between the trial judge and counsel for Petitioner concerning whether Rhett Russell would be permitted to testify regarding Petitioner's invention demonstrates that the trial judge excluded the evidence because it arose after the crime, not because it was hearsay. Petitioner's counsel stated that "Mr. Russell is familiar with all those details and would testify about that," and the judge's only question to counsel was whether Mr. Russell's testimony concerned "some thoughts and ideas that have been developed by Mr. Jordan since he has been in prison." App. 53a.

[9] 442 U.S. at 97 (citing *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)).

[10] Respondent's Brief in Opposition at 21.

[11] 464 So. 2d at 490-91, App. 30a-31a (Robertson, J., concurring in part and dissenting in part); *see also id.* at 491-92, App. 32a-33a (Hawkins, J., joining Robertson, J.).

ensure that this aggravating circumstance was applied in a constitutional manner in this case. Rather, Respondent attempts to avoid the mandate of *Godfrey v. Georgia*, 446 U.S. 420 (1980), by arguing that the decision of a plurality of this Court in *Godfrey* is somehow inapplicable to the Mississippi capital sentencing statute. In effect, Respondent argues that Mississippi need not limit in any way the aggravating circumstance "especially heinous, atrocious or cruel" because the Mississippi statute has already narrowed the class of persons who are subject to capital punishment.

Respondent has missed the point. Whether or not the Mississippi definition of capital murder narrows the class of persons eligible for the death penalty, the Mississippi statute—unlike the Texas statute on which Respondent so heavily relies—requires the sentencing jury to weigh the aggravating and mitigating circumstances in determining whether to sentence a defendant to life or death. If the jury is to weigh aggravating and mitigating circumstances, it is imperative that the aggravating circumstances not be unconstitutionally vague.[12]

Respondents' own lengthy quotations from *Zant v. Stephens*, 462 U.S. 862 (1983), refute its argument. For example, this Court, in explaining why the presence of an improper aggravating circumstance did not render the death sentence unconstitutional, emphasized that:

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[12] To quote the Fifth Circuit's observations in vacating Petitioner's earlier death sentence:

> The State argues that if, under Texas law, the statutory offense is sufficient to constitute the aggravating circumstance, the same should hold true for Mississippi. This argument misses the point. Proof of guilt of the statutory offense may well have been a sufficient and constitutional basis on which to assess the death penalty if the jury had been limited to that proof. But not only was the consideration by the Petitioner's jury of aggravating circumstances not so limited; each juror was invited to decide for himself or herself what was an aggravating circumstance. That will not pass muster under *Godfrey* and its predecessors.

Jordan v. Thigpen, 688 F.2d 395, 397 (5th Cir. 1982) (per curiam).

> In Georgia . . . the jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard. Thus, in Georgia, the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty.[13]

The Court explicitly distinguished the Georgia statute from others that "require[] the jury to weigh the aggravating circumstances against the mitigating circumstances when it decides whether or not the death penalty should be imposed." [14] The Mississippi capital punishment statute, unlike the Georgia statute, explicitly directs the jury to find that "there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances" [15] before imposing the death penalty.

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[13] *Zant v. Stephens*, 462 U.S. at 873-74 (footnote omitted), *quoted in* Respondent's Brief in Opposition at 26. Similarly, the *Zant* Court explained that under the Texas scheme in *Jurek v. Texas*, 428 U.S. 262 (1976), "aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution and certainly were not explicitly balanced against each other." 462 U.S. at 876 n.13, *quoted in* Respondent's Brief in Opposition at 33.

[14] *Zant v. Stephens*, 462 U.S. at 874 n.12 (citing Ark. Stat. Ann. § 41-1302(1) (1977); N.C. Gen. Stat. § 15A-2000(b) (1978); Tenn. Code Ann. § 39-2-203(g) (1982); Wyo. Stat. § 6-2-102(d)(i) (1983)). Thus, Respondent is quite incorrect to characterize the Mississippi statute as "unique," Respondent's Brief in Opposition at 36. *See, e.g.*, Ala. Code §§ 13A-5-45 to -46 (1975); N.M. Stat. Ann. § 31-20A-2 (Supp. 1981); Utah Code Ann. § 76-3-207 (Supp. 1983). Respondent's misapplication of *Zant v. Stephens* to one of the numerous statutes requiring the weighing of aggravating and mitigating circumstances merely underscores our previous observation that this issue is among the most critical in death penalty litigation. Petition for Writ of Certiorari at 18.

[15] Miss. Code Ann. § 99-19-101(3)(c) (Supp. 1984).

In short, Respondent has not shown any justification for the Mississippi courts' refusal to apply the *Godfrey* mandate. The lower courts' disregard for this Court's precedent justifies certiorari.

III.

Respondent does not deny that the prosecutor's comments in his closing argument constituted egregious misconduct. For example, Respondent makes no attempt to justify the prosecutor's statements that the jury had "a duty and a job . . . to impose the death penalty" and that the victim's two young children "demand" the death penalty, statements to which Petitioner's counsel immediately objected.[16] Similarly, Respondent makes no attempt to demonstrate that the prosecutor's commentary regarding Petitioner's refusal to testify in earlier trials in this case—commentary to which Petitioner's counsel also objected immediately[17]—was more probative than prejudicial, as required by *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980).[18] Instead, Respondent appears to argue

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[16] App. 74a; *see* Petition for Writ of Certiorari at 21-22 & n.58.

[17] App. 64a.

[18] *See also* Petition for Writ of Certiorari at 25-26 & nn.70-71. In addition, Respondent never denies the impropriety of the prosecutor's statement that "I have never in my eleven (11) years of practice ever seen a case so atrocious, so cruel and inhumane, that justifies the death penalty as this particular case does." App. 65a. As the Eleventh Circuit recently observed, "Such comments, made by an experienced prosecutor, may alter the jury's exercise of complete discretion by suggesting that a more authoritative source has already decided the appropriate punishment." *Tucker v. Kemp*, 762 F.2d 1480, 1484 (11th Cir. 1985) (en banc); *see also Drake v. Kemp*, 762 F.2d 1449, 1459 (11th Cir. 1985) (en banc). This Court has recently confirmed that a death sentence is unconstitutional when based on "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others." *Caldwell v. Mississippi*, 105 S. Ct. 2633, 2641-42 (1985); *see also id.* at 2639 ("it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere").

that Petitioner did not raise below on appeal the same aspects of the closing argument that the petition raises and did not make contemporaneous objections at trial. Both points are without merit.

Respondent concedes that Petitioner raised in his initial brief below the numerous objectionable portions of the prosecutor's closing argument.[19] Focusing on the Mississippi Supreme Court's silence on this issue, Respondent suggests that Petitioner needed to raise the point in his rehearing petition in order to preserve the issue for this Court's review. Even if that were true, Respondent's claim that Petitioner did not raise in his petition for rehearing the "other highly improper and prejudicial remarks" made in the prosecutor's closing argument is wholly inaccurate. In his petition for rehearing, Petitioner expressly stated that:

> in holding that the prosecutor's closing argument did not amount to reversible error, the Court's opinion focuses on those portions of the argument in which the prosecutor commented on Petitioner's failure previously to take the stand. *But Petitioner urged in his briefs—and continues to urge now—that the prosecutor made other improper and prejudicial remarks that require reversal* . . . . For example, the prosecutor told the jury: "I feel strongly about this case. And I'm not going to sit here as an officer of the Court and lie to you about the facts in this case. . . . [*Y*]*ou have a duty and a job consist*[*e*]*nt with the oath that you took when it was administered to you—to impose the death penalty when the facts and circumstances are warranted.* And they are warranted here." . . . Defense counsel objected to these remarks about the prosecutor's personal views and the jury's "duty." [20]

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[19] Respondent's Brief in Opposition at 46; *see also* App. 91a-96a.

[20] Brief in Support of Petition for Rehearing at 1 n.1 (emphasis added in part); *see also* Petition for Rehearing at 2 (urging, as a ground for rehearing, that "[t]he prosecutor's closing argument included numerous references to the defendant's prior exercise of

Furthermore, Respondent is wrong as a matter of law in its assertion that this Court does not have jurisdiction over this case because the Mississippi Supreme Court failed to address some of the issues brought before it.[21] It is patently absurd to suggest that, when faced with a well-pleaded federal claim, a state court may deprive this Court of jurisdiction simply by rejecting the claim sub silentio. The state court had the first opportunity to consider the constitutional arguments. Nothing more is required to give this Court jurisdiction.[22]

Equally specious is Respondent's argument that Petitioner did not properly preserve his grounds for appeal because he failed to object contemporaneously to every single one of the prosecutor's numerous improper closing remarks. In fact, Petitioner's counsel made two objections during the prosecutor's closing argument, both of which were overruled, and one more at the conclusion of the argument—even though Mississippi courts relax their contemporaneous objection requirement in death penalty cases because of the seriousness of the punishment that may be inflicted.[23] This Court has recently recognized that opposing counsel should only rarely interrupt a closing argument by objecting to improper statements.[24] In-

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his Fifth Amendment right not to testify as well as other highly improper and prejudicial remarks").

[21] Respondent cites *Webb v. Webb*, 451 U.S. 493 (1981), a child custody case, for the proposition that this Court has no jurisdiction where a question was not presented *and* passed on in the state court. *Webb* is distinguishable from the instant case, however, because there the petitioner had failed to raise her federal claim in the state court.

[22] *See Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (explaining policy reasons for rule).

[23] *See, e.g., Williams v. State*, 445 So. 2d 798, 810-12 (Miss. 1984) (recognizing lack of contemporaneous objection, but reaching error assigned on appeal anyway), *cert. denied*, 105 S. Ct. 803 (1985); *Culberson v. State*, 379 So. 2d 499, 506 (Miss. 1979), *cert. denied*, 449 U.S. 986 (1980).

[24] *United States v. Young*, 105 S. Ct. 1038, 1046 (1985) ("interruptions of arguments, either by an opposing counsel or the pre-

stead, this Court has suggested that an objection at the close of an improper argument, along with a request that the judge give a timely warning and an instruction to the jury to disregard the improper statements, are sufficient to preserve an appeal.[25] Petitioner's counsel substantially complied with this suggestion.[26]

Even if one assumes arguendo that Petitioner's counsel did not object in a timely fashion, this Court has jurisdiction. Earlier this Term, in *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985), this Court held that "[t]he mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case."[27] Moreover, the state court opinion must *expressly* indicate that it is based on the state procedural bar—here, the alleged absence of a contemporaneous objection—for this Court's jurisdiction to be precluded.[28] The majority opinion below, however, never states that it rests on any independent state ground. In fact, in resolving all the issues, the state supreme court explicity found for Respondent on the merits of the case, without addressing any supposed procedural default.[29]

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siding judge, are matters to be approached cautiously"); *cf. Brooks v. Kemp*, 762 F.2d 1383, 1397 n.19 (11th Cir. 1985) (en banc) (observing that "professional courtesy" kept defense counsel from interrupting improper argument, but noting that objection was eventually made, and reaching issue).

[25] *Young*, 105 S. Ct. at 1045-46 (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 644 (1974)).

[26] A request for a curative instruction following the trial court's immediate overruling of Petitioner's post-argument objection would have been futile.

[27] 105 S. Ct. at 2638.

[28] *Id.*

[29] *Cf. County Court of Ulster County v. Allen*, 442 U.S. 140, 152-53 (1979) (federal habeas corpus proceeding). Another indication that the state supreme court did not rest its decision on an

In short, Respondent has made no attempt whatsoever to justify the prosecutor's closing argument, and there is no bar to this Court's jurisdiction to decide the propriety of his commentary. The cavalier treatment of Petitioner's argument by the Mississippi Supreme Court, far from depriving this Court of jurisdiction, shows a disregard of federal constitutional rights that warrants this Court's intervention.

CONCLUSION

The importance of the questions presented is shown not only by the petition, but by Respondent's brief itself. We respectfully request that this Court grant the petition for a writ of certiorari to review the five-to-four decision of the Supreme Court of Mississippi.

Respectfully submitted,

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independent state ground is the court's extensive reliance on federal case law in its opinion. *See Michigan v. Long*, 463 U.S. 1032, 1037 (1983) (no adequate and independent state ground where "[t]he court below referred twice to the State Constitution in its opinion, but otherwise relied exclusively on federal law").

[30] Counsel wish to express their appreciation to Teresa D. Baer, a summer associate at Wilmer, Cutler & Pickering, for her assistance in the preparation of this brief.